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The Automatic Stay in Bankruptcy

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THE AUTOMATIC STAY IN BANKRUPTCY

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I. THE AUTOMATIC STAY GENERALLY AND THE PARTIES IT PROTECTS

¶1.000 GENERALLY

Immediately upon the filing of a voluntary petition under the Bankruptcy Code a stay arises which generally bars all debt collection efforts against the debtor or property of his bankruptcy estate although the collection of postpetition debts *against the debtor* is not stayed.¹ The court need not sign any order to give rise to the stay; the mere filing of the petition, with supporting documentation, with the clerk is sufficient.²

¶2.000 PURPOSE OF THE AUTOMATIC STAY

The automatic stay is one of the fundamental debtor protections afforded by the Bankruptcy Code. It gives the debtor a breathing spell from his creditors and it also stops all collection efforts, all harassment and all foreclosure actions. It gives the debtor time to file a plan of reorganization, or simply relieves him of the financial pressures that drove him into bankruptcy.³

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¹ 11 U.S.C. § 362(a) (1978 & Supp. 1985).

² *In Re Artishon*, 39 Bankr. 890, 893 (Bankr. D. Minn. 1984); *Jones v. Wood* (*In Re Wood*), 33 Bankr. 320, 321 (Bankr. D. Idaho 1983).

³ S. REP. NO. 95-989, 95th Cong., 2d Sess. 54-55 (1978), *reprinted in* 1978 U.S. Code

At least two goals are implemented by the stay. First, the stay prevents the diminution or dissipation of the assets of the estate during the pendency of the bankruptcy case.⁴ Second, it enables the debtor to avoid the multiplicity of claims arising against him in different forums.⁵ The stay is intended to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts. The stay insures that the debtor's affairs will be initially centralized in a single forum in order to prevent conflicting judgments from different courts and to harmonize the interests of all creditors.⁶

¶3.000 STATUTORY FRAMEWORK

Under § 362(a), eight subsections indicate what types of conduct are barred by the automatic stay. Exceptions to the stay are specified by the eleven subsections of § 362(b). The reputation of the pervasiveness of § 362(a) among legal practitioners and members of the bench has done much to add a certain judicial gloss to the expansiveness afforded that provision in some of the cases under which it is construed, and thus the breadth of the automatic stay may extend beyond the literal language of the statute.⁷

Several distinctions may be observed in understanding § 362(a). The first is that that provision speaks of actions against the debtor and actions against the debtor's estate.⁸ An additional distinction based on the concept of property of the estate, as defined in 11 U.S.C. § 541(a), and implicitly recognized in § 362(a), is that property of the *debtor*, as opposed to property of the *estate*, is not protected by the automatic stay against the collection of debts that arose after the filing of the petition. Thus, in determining whether the automatic stay is applicable, it must be determined whether the creditor's action is against: 1) the debtor; 2) property of the estate; or 3) property of the debtor.⁹ The second distinction is that § 362(a) speaks of debts that arose prior to the commencement of the bankruptcy proceeding, as opposed to debts which arose thereafter. This is one expression of the philosophy of the Bankruptcy Code that the filing of the petition is an important cleavage date in separating those matters

Cong. & Ad. News 5787, 5840-41.

⁴ *In Re Towner Petroleum Co.*, 48 Bankr. 182, 185 (Bankr. W.D. Okla. 1985).

⁵ *Id.*

⁶ *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977).

⁷ *See, e.g.*, *Ellison v. Northwest Engineering Co.*, 707 F.2d 1310, 1311 (11th Cir. 1983)(although the literal terms of § 362(a) do not so provide, *courts* are also "bound by the automatic stay provisions of 11 U.S.C. § 362(a)(1)").

⁸ *Mason v. Williams (In Re Mason)*, 45 Bankr. 498, 499-500 (Bankr. D. Ore. 1984); *Wymouth v. York (In Re York)*, 13 Bankr. 757 (Bankr. D. Me. 1981).

⁹ *Nevada National Bank v. Casgul of Nevada, Inc. (In Re Casgul of Nevada, Inc.)*, 22 Bankr. 65, 66 (Bankr. 9th Cir. 1982).

that should affect the bankruptcy proceeding and those that should not. Thus, a creditor who is owed a debt by a chapter 7 debtor that arose *after* the filing of the petition may generally proceed against the debtor or against property not belonging to the estate.

¶4.000 BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

Several changes were wrought in the provisions on the automatic stay by the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("the 1984 Act"), Pub. L. No. 98-353, 98 Stat. 333 (July 10, 1984). Generally, the changes effected under § 362, as well as those under the other sections of title 11 of the United States Code, are effective as to cases filed 90 or more days after the enactment date of July 10, 1984. Thus, questions on the scope of the automatic stay in a particular case must be resolved with an eye toward the filing date of the petition. Except as otherwise noted, all discussion of the stay in this work presupposes the applicability of the Bankruptcy Amendments and Federal Judgeship Act of 1984.

¶5.000 SCOPE OF THE AUTOMATIC STAY

¶5.100 *Scope of the Automatic Stay as to the Debtor*

As a general matter the automatic stay does not bar the debtor from performing any action.¹⁰ The case law has carved a few exceptions to this rule.¹¹

¶5.200 *Scope of the Automatic Stay as to Codebtors in Chapter 13 Proceedings*

The automatic stay of § 362(a) does not extend to protect those individuals who are jointly liable on debts with a debtor in a chapter 7 or 11 case. Hence, on the filing of a debtor's petition under either of those two chapters, the debtor's sureties and guarantors would remain subject to creditor action notwithstanding § 362(a). An exception to this rule is provided for cases pending in chapter 13 through 11 U.S.C. § 1301 which states as follows:

§ 1301. Stay of action against codebtor (a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or

¹⁰ Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3d Cir. 1982); *In Re Augustus Court Assoc.*, 43 Bankr. 352, 353 (Bankr. E.D. Pa. 1984); *Ideal Roofing & Sheet Metal Works, Inc. v. M. R. Harrison Constr. Corp.* (*In Re Ideal Roofing & Sheet Metal Works, Inc.*), 9 Bankr. 2, 3 (Bankr. S.D. Fla. 1980).

¹¹ 11 U.S.C. § 1301. (See also the discussion on requesting relief from the automatic stay of § 362(a) *infra* text accompanying notes 115-120).

continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless—

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under chapter 7 or 11 of this title.

(b) A creditor may present a negotiable instrument, and may give notice of dishonor of such an instrument.

(c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided by subsection (a) of this section with respect to a creditor, to the extent that—

(1) as between the debtor and the individual protected under subsection (a) of this section, such individual received the consideration for the claim held by such creditor;

(2) the plan filed by the debtor proposes not to pay such claim; or

(3) such creditor's interest would be irreparably harmed by continuation of such stay.

(d) Twenty days after the filing of a request under subsection (c)(2) of this section for relief from the stay provided by subsection (a) of this section, such stay is terminated with respect to the party in interests making such request, unless the debtor or any individual that is liable on such debt with the debtor files and serves upon such party in interest a written objection to the taking of the proposed action.

¶5.300 *The Applicability of the Automatic Stay in Favor of the Debtor's Co-Defendants*

Where the debtor is one of several defendants in a civil action commenced prior to the filing of the petition, the automatic stay, of course, would generally bar all further action in the suit against the debtor for prepetition debts in the absence of relief from the automatic stay.¹² The stay would not bar the continuation of the litigation against the other defendants.¹³ In the absence of relief from the stay the plaintiff in a civil action may still advance the litigation against the other defendants while (1) holding the matter in abeyance as to the debtor or (2) seeking, and ultimately obtaining, the debtor's dismissal from the suit. A

¹² Section 362(a)(1); *but see* § 362(b)(4)-(5).

¹³ *Pitts v. Unarco Ind., Inc.*, 698 F.2d 113 (7th Cir.), *cert. denied*, 104 S. Ct. 509 (1983); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Williford v. Armstrong World Indus. Inc.*, 715 F.2d 124 (4th Cir. 1983).

decision to stay a suit against a non-debtor co-defendant is one that is predicated on federal law.¹⁴

¶5.400 *The Applicability of the Automatic Stay in Favor of the Debtor's Principles*

The automatic stay does not protect the principals, such as the directors and officers, of a debtor entity.¹⁵ If the real objective of the litigation is the debtor rather than the principals or if the continuation of the action would burden the estate¹⁶ and frustrate reorganization through diversion of corporate manpower into the defense of individual suits, the court may bar the continuation of the action under 11 U.S.C. § 105.

¶5.500 *Summary of Actions Barred by the Automatic Stay*

The protection of the automatic stay is quite broad. It bars, *prima facie*, the following types of conduct: the commencement or continuation of judicial or administrative process against the debtor that was or could have been commenced against the debtor prior to the filing of the petition;¹⁷ the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case;¹⁸ an act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;¹⁹ any act to create, perfect, or enforce any lien against property of the estate;²⁰ any act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the bankruptcy case;²¹ any act to collect, assess or recover a claim against the debtor that arose before the commencement of the bankruptcy case;²² the setoff of any debt owing to the debtor that arose before

¹⁴ *Herron v. Keene Corp.*, 751 F.2d 873, 874-75 (6th Cir. 1985).

¹⁵ *In Re Anje Jewelry Co., Inc.* 47 Bankr. 485 (Bankr. E.D. N.Y. 1983)(suit not barred against principals of a debtor corporation even though action was also against the debtor corporation although the corporation was a co-defendant); *In Re Trails End Lodge, Inc.*, 45 Bankr. 597 (Bankr. D. Ver. 1984); *Nevada National Bank v. Casgul of Nevada, Inc. (In Re Casgul of Nevada, Inc.)*, 22 Bankr. 65 (Bankr. 9th Cir. 1982)(appellate court held that bankruptcy court, in concluding that relief from the stay was obligatory as to a secured creditor, erred by mandating that the creditor proceed against the debtor's collateral before recourse against collateral pledged by the debtor's principals).

¹⁶ *Jones-Manville Corp. v. Asbestos Litigation Group (In Re Jones-Manville Corp.)*, 40 Bankr. 219 (S.D.N.Y. 1984).

¹⁷ Section 362(a)(1).

¹⁸ Section 362(a)(2).

¹⁹ Section 362(a)(3).

²⁰ Section 362(a)(4).

²¹ Section 362(a)(5).

²² Section 362(a)(6).

the commencement of the case under the Bankruptcy Code;²³ and the commencement or continuation of a proceeding in the United States Tax Court "concerning" the debtor.²⁴

§5.600 *Summary of Actions Not Barred by the Automatic Stay*

The filing of a petition does not operate as a stay: of the commencement or continuation of criminal action against the debtor;²⁵ of the collection of alimony, maintenance or support from property that is not property of the estate;²⁶ of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under 11 U.S.C. § 546(b) or to the extent that such act is accomplished within the period provided under 11 U.S.C. § 547(e)(2)(A) for the perfection of a security interest within the allowable ten day period;²⁷ under § 362(a)(1), of the commencement or continuation of an action or proceeding by a governmental unit to enforce such unit's police or regulatory power;²⁸ under § 362(a)(2), of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a government unit to enforce its police or regulatory power;²⁹ certain setoffs by a commodity broker, forward contract merchant, stockbroker etc.;³⁰ of the setoff by a repo participant under certain situations;³¹ of the commencement of an action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;³² the issuance to the debtor by a governmental unit of a notice of a tax deficiency notice;³³ any act of a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under title 11 to obtain possession of such property;³⁴ and of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument.³⁵

²³ Section 362(a)(7).

²⁴ Section 362(a)(8).

²⁵ Section 362(b)(1).

²⁶ Section 362(b)(2).

²⁷ Section 362(b)(3).

²⁸ Section 362(b)(4).

²⁹ Section 362(b)(5).

³⁰ Section 362(b)(6).

³¹ Section 362(b)(7).

³² Section 362(b)(8).

³³ Section 362(b)(9).

³⁴ Section 362(b)(10).

³⁵ Section 362(b)(11).

¶5.700 Actions Barred by the Automatic Stay

¶5.710 Subsection 362(a)(1) bars:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title 11[.]³⁶

Generally all debt collection efforts against the debtor on prepetition debts and all legal process against the debtor are stayed under this provision if such process was, or could have been, commenced prior to the filing of the petition. Also noteworthy is that *this* aspect of the stay only bars litigation against the *debtor*. Litigation or debt collection against the debtor on postpetition claims is not barred by § 362(a)(1). As we discussed previously, under § 322(a)(1) litigation against co-debtors, co-defendants, or principals of a debtor is not barred.

The filing of counterclaims against the debtor by an entity is a violation of the automatic stay if the filing of that counterclaim against the debtor would be violative as an independent suit.³⁷ Nonetheless, a bankruptcy court's denial of a defendant's motion for relief from the automatic stay in order to interpose a counterclaim may constitute an abuse of discretion since the "policy of the Bankruptcy statute is to allow . . . counterclaims."³⁸

As is no surprise, belligerent demands for payment of a prepetition debt is a violation of the stay.³⁹

Notwithstanding the literal terms of § 362(a), a labor strike to collect on a prepetition debt does not violate the automatic stay in light of the Norris-LaGuardia Act, 29 U.S.C. §§ 101 - 115.⁴⁰

Where the debtor, who had filed a third party complaint against a previously unjoined entity, was a defendant in a civil action in federal district court the court held that the stay did not bar the postpetition entry of summary judgment in favor of the third party defendant and against the debtor. In this case judicial action was essentially nothing

³⁶ Section 362(a)(1).

³⁷ Ideal Roofing & Sheet Metal Works, Inc. v. M. R. Harrison Const. Corp. (*In Re Ideal Roofing & Sheet Metal Works, Inc.*), 9 Bankr. 2, 3 (Bankr. S.D. Fla. 1980).

³⁸ Bohack Corp. v. Borden, Inc. 599 F.2d 1160, 1168 (2d Cir. 1979)(decided under the Bankruptcy Act of 1898).

³⁹ Underwood v. DeLay (*In Re DeLay*), 48 Bankr. 282 (Bankr. W.D. Wis. 1984).

⁴⁰ Crowe & Assoc., Inc. v. Bricklayers and Masons Union Local No. 2 of Detroit, Michigan, 713 F.2d 211 (6th Cir. 1983); Petrusch v. Teamsters Local 317, Syracuse, N.Y., 667 F.2d 297 (2d Cir. 1981).

more than a dismissal with prejudice of the third party complaint; no other relief was apparently entered in favor of the third party.⁴¹

A questionable decision from the U.S. Court of Appeals for the Third Circuit held that where A. filed a postpetition suit against B., to which B. filed a postpetition complaint against the debtor for indemnity and contribution, the stay of § 362(a)(1) did not bar the filing of the third party complaint against the debtor although all the operative facts giving rise to the suit arose prepetition.⁴² The court predicated the result on a state court procedural rule which barred the filing of an action for indemnity and contribution until after suit had been commenced against the third party plaintiff, in this case B. Since the third party complaint could not have been lodged prior to the filing of the petition in the absence of the filing of A.'s suit, the court held that the action was not barred by the automatic stay. In the face of the breadth of the definition of a "claim" in 11 U.S.C. § 101(4), which provides a federal rule of decision for the case, one is left to wonder why the court preferred instead to apply a state court procedural rule as a rule of decision notwithstanding *Erie R.R. v. Tompkins*, 304 U.S. 64.

¶5.720 Subsection 362(a)(2)

Under § 362(a)(2) the stay bars:

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title[.]⁴³

Accorded protection under this subsection are the debtor and property of the estate. Property of the estate is defined at 11 U.S.C. § 541(a). Section § 362(a)(2) does not expressly bar the enforcement of judgments against "property of the debtor," such relief being accorded under § 362(a)(5).

The enforcement of a judgment obtained after the filing of the petition would not be barred by § 362(a)(2), but § 362(a)(1) would prohibit a party from seeking or obtaining such a judgment unless the intended judgment was on a postpetition debt. Section 362(b)(5) also exempts from the stay the enforcement of judgments held by a governmental unit to enforce its police or regulatory power.

¶5.730 Subsection 362(a)(3)

The third subsection of § 362(a) bars:

(3) any act to obtain possession of property of the estate or of

⁴¹ *Jefferson Ward Stores, Inc. v. Doody Co.*, 48 Bankr. 276 (Bankr. E.D. Pa. 1985).

⁴² *Avellino & Bienes v. M. Frenville Co., Inc.* (In Re M. Frenville Co., Inc.), 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 911 (1985).

⁴³ Section 362(a)(2).

property from the estate or to exercise control over property of the estate[.]⁴⁴

The provision enjoins the taking of property of the estate and property from the estate. The clause barring acts against property "from" the estate apparently prohibits an entity from attempting to possess property in the possession of the estate or on property of the estate but which is not property of the estate. The mere possessory interest is protected. Thus, § 362(a)(3) would bar a landlord from dispossessing a debtor/lessee from a leasehold after the filing of the petition even though the debtor's default under the lease might provide for that recourse.⁴⁵ However, § 362(b)(10) exempts from the stay acts by a landlord against a nonresidential real property lease which has terminated before the commencement of a case or during its pendency according to the terms of the lease. For a possible exception to § 362(b)(10) see 11 U.S.C. § 108(b) which is discussed below.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 added the final clause of § 362(a)(3) to protect against the "exercise [of] control over property of the estate." This provision was apparently added to "overrule" cases such as those holding that the stay was not violated by a bank's exercise of dominion over estate funds on deposit with the bank by the bank's freezing of the account. Prior to the passage of this clause, the bankruptcy courts were split over whether actions such as these were a violation of the stay.⁴⁶

This new clause appears to mandate that a creditor holding any property of the estate turn it over to the debtor, or suffer the risk of a finding of contempt for violating § 362(a)(3). Yet the apparent turnover requirement under § 362(a)(3) is at odds with the more explicit language of 11 U.S.C. § 542 which imposes several conditions on turnover. Presumably the case law will reconcile the schism.

In a case where an insurer sought to cancel an insurance policy under a "cancelable at will" clause after the debtor filed for bankruptcy, the court found that the filing of the petition was the sole basis for such action. The court held that the policy was property of the estate, and the insurer's action was violative of §§ 362(a)(3) and 363(e) which allows the trustee or debtor in possession to use, sell or lease property of the estate notwithstanding any provision in a lease, contract or applicable law that

⁴⁴ Section 362(a)(3).

⁴⁵ *In Re Law Clinic of Mott & Gray, P.C.*, 39 Bankr. 73, 74 n.3 (Bankr. E.D. Pa. 1984); *Roslyn Savings Bank v. Comcoach Corp.* (*In Re Comcoach Corp.*), 19 Bankr. 231 (Bankr. S.D.N.Y. 1982), *aff'd*, 698 F.2d 571 (2d Cir. 1983).

⁴⁶ See, e.g., *Georgia Federal Bank, FSB v. Owens-Peterson* (*In Re Owens-Peterson*), 39 Bankr. 186 (Bankr. N.D. Ga. 1984)(no violation); *Bank of America National Trust and Savings Assoc. v. Edgins* (*In Re Edgins*), 36 Bankr. 480, 484 (Bankr. 9th Cir. 1984)(no violation); *Cusanno v. Fidelity Bank*, 29 Bankr. 810 (Bankr. E.D. Pa. 1983)(violation), vacated and remanded without published opinion, 734 F.2d 3 (3d Cir. 1984).

is conditioned on, *inter alia*, the filing of bankruptcy. The court enjoined the cancellation.⁴⁷

¶5.740 Subsection 362(a)(4)

Subsection 362(a)(4) prohibits:

- (4) any act to create, perfect, or enforce any lien against property of the estate[.]⁴⁸

This provision protects the integrity of property of the estate and bars the creation, perfection or enforcement of any lien against that property. A lien is defined as any "charge against or interest in property to secure payment of a debt or performance of an obligation."⁴⁹ The definition includes judicial liens, statutory liens, mortgages and other consensual liens.⁵⁰

¶5.750 Subsection 362(a)(5)

Affording protection to the debtor, § 362(a)(5) enjoins:

- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title[.]⁵¹

While § 362(a)(4) bars lien enforcement against property of the estate, § 362(a)(5) prohibits such acts against property of the debtor, but unlike § 362(a)(4) protection is only accorded under § 362(a)(5) if the action is predicated on a prepetition claim.

¶5.760 Subsection 362(a)(6)

Though largely, if not completely replowing the same terrain as § 362(a)(1), § 362(a)(6) expresses a ban against:

- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]⁵²

As with § 362(a)(1), only actions against the debtor on prepetition claims are barred.

⁴⁷ *Gulf Tampa Drydock Co. v. Ins. Co. of North Am. (In Re Gulf Tampa Drydock Co.)*, 49 Bankr. 154 (Bankr. M.D. Fla. 1985).

⁴⁸ Section 362(a)(4).

⁴⁹ Section 101(31).

⁵⁰ *Commonwealth of Penna., Dept. of Public Welfare, v. Griggs (In Re Griggs)*, 12 Bankr. 443 (Bankr. E.D. Fla. 1981).

⁵¹ Section 362(a)(5).

⁵² Section 362(a)(6).

¶5.770 Subsection 362(a)(7)

This provision restricts postpetition setoffs by enjoining:

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor[.]⁵³

Exceptions are provided under § 362(b)(6) and (b)(7). By its terms the provision does not bar the setoff of two postpetition debts. Where under applicable Pennsylvania law, the retention of a debtor's funds by a creditor provided sufficient evidence of an intent to setoff, the IRS violated § 362(a)(7) merely by its retention of the debtor's tax refund check which was property of the estate.⁵⁴ Because the Bankruptcy Amendments and Federal Judgeship Act of 1984 added to § 362(a)(3) the language that the "exercise of control over property of the estate" is a violation of the stay, a creditor is apparently under an affirmative duty to turnover all property of the estate to the debtor or, if applicable, the trustee, or risk contempt under § 362(a)(3).⁵⁵

As a collateral matter, the right of setoff in bankruptcy is preserved, with some modification, in 11 U.S.C. § 553. For the principles governing the substantive right of setoff, see applicable nonbankruptcy law. See, *infra*, for discussion on obtaining relief from the stay to setoff debts.

¶5.780 Subsection 362(a)(8)

Simply enough, § 362(a)(8) prohibits:

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.⁵⁶

¶5.800 *Actions Exempted from the Automatic Stay*

¶5.810 Subsection 362(b)(1)

Section § 362(b)(1) expressly states that the filing of a petition for relief under the Bankruptcy Code does not operate as a stay:

(1) under [§ 362(a)], of the commencement or continuation of a criminal action or proceeding against the debtor[.]⁵⁷

"The bankruptcy laws are not a haven for criminal offenders, but are designed to give relief from financial overextension. Thus, criminal

⁵³ Section 362(a)(7).

⁵⁴ *U.S. v. Norton*, 717 F.2d 767 (3d Cir. 1983).

⁵⁵ See *supra* notes 43-47 and accompanying text.

⁵⁶ Section 362(a)(8).

⁵⁷ Section 362(b)(1).

actions and proceedings may proceed in spite of bankruptcy.”⁵⁸

Although criminal actions are exempted from the stay, civil actions, whether by the government or private citizens, are not exempted. But see, § 362(b)(4) and (b)(5)(exempting certain government actions). Nonetheless, the distinction between criminal and civil actions blurs on occasion, such as when a prosecution for passing bad checks is initiated at the behest of the creditor. In such actions the creditor's intent is to obtain payment on the check notwithstanding the pendency of the bankruptcy and the prospect of discharge in bankruptcy of the debt arising from the bounced check. The language of § 362(b)(1) intimates that regardless of whether bad check charges are brought against the debtor by the district attorney or in a private criminal complaint by the creditor, the action is not stayed by § 362(a).⁵⁹

To augment the scope of § 362(a), debtors have often requested an injunction under 11 U.S.C. § 105 in order to bar the continuation of the bad check prosecution. The language of § 105 has been found sufficiently broad to allow a United States court to stay state court proceedings upon the proper facts.⁶⁰

⁵⁸ S. REP. NO. 989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5837.

⁵⁹ *Davis v. Sheldon*, 691 F.2d 176 (3d Cir. 1982)(the court assumed that the action was not stayed).

⁶⁰ *Davis v. Sheldon*, 691 F.2d 176. Questions on the interaction of § 362(a) and bad check prosecutions have arisen numerous times due to the concatenation of several issues among which are: the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) on the comity between federal courts and state criminal prosecutions; the supercession of protection from § 362(a) to § 524(1) on the debtor's discharge; and the dischargeability of the debt for the bounced check or court ordered restitution on such a check. The following analysis of the problem is pieced together from numerous cases, some of which are in conflict, plus various provisions of the Bankruptcy Code. Due to the unsettled state of the law in this field one should continue to monitor or review late developments in the case law.

To augment the scope of § 362(a), debtors have often requested an injunction under § 105 to bar the continuation of the bad check prosecution. One obstacle to such relief is 28 U.S.C. § 2283, (1977) “the Anti-Injunction Act,” which states that, “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, to protect or effectuate its judgments.” The language of § 105 has been found sufficiently broad to allow a United States court to stay state court proceedings upon the proper facts. *Davis v. Sheldon*, 691 F.2d 176, 177-78 (3d Cir. 1982). A bankruptcy judge may exercise his authority under § 105(a) to enjoin litigants from appearing before another court. *Davis*, 691 F.2d at 175, 177-78 n.5. The power of a federal court to enjoin state court proceedings is tightly circumscribed and should not be used except under extraordinary circumstances where there is a great and immediate danger of irreparable harm to the plaintiff's federally protected rights that cannot be eliminated by his defense to a single prosecution. *Younger v. Harris*, 401 U.S. 37, 31 (1971). The state prosecution may be enjoined if it is brought in bad faith. *Davis v. Sheldon*, 691 F.2d at 177, 178. It is generally held that the bringing of the criminal act for the purpose of collecting on the debt is apparently not bad faith *per se*. *Id.* Even if restitution is the sole purpose of a state criminal proceeding, at least one court

¶5.820 Subsection 362(b)(2)

Under § 362(b)(2) the stay does act as an injunction:

(2) Under [§ 362(a)], of the collection of alimony, maintenance, or support from property that is not property of the estate[.]⁶¹

As stated in § 362(b)(2), the collection of alimony, maintenance or support is not hampered by the automatic stay if the property sought is not property of the estate.⁶² The most important application of this rule is in the collection of postpetition wages from services performed by an individual chapter 7 or 11 debtor. By implication through 11 U.S.C. § 541(a)(6), such earnings are not property of the estate and attempts to collect those wages to satisfy claims of alimony, maintenance or support would not be precluded by the automatic stay. In a chapter 13 proceeding the automatic stay would bar the collection of those wages to satisfy those claims since those wages are included in the estate under 13 U.S.C. § 1306(a)(2).⁶³ In chapter 7, 11 or 13 the automatic stay bars the collection of alimony, maintenance or support from property of the estate.⁶⁴

The stay of 11 U.S.C. § 362(a) barring any act against the property of the estate continues only until the property is no longer property of the estate.⁶⁵ When property is exempted under 11 U.S.C. § 522, that property is no longer property of the estate. Thus, that aspect of the stay is lifted when the property is exempted. Under 11 U.S.C. § 522(c), exempted

has held that an injunction under § 105 should not be issued. *Walsh v. Abrams (In Re Walsh)*, 45 Bankr. 668, 673 (Bankr. E.D.N.Y. 1985). A criminal action is brought in bad faith when the complaining witness has insufficient evidence to support the allegations, when the prosecuting authority has reason to doubt the validity of the charges or when the prosecuting authority fails to exercise independent judgment in continuing the prosecution. *In Re Jerzak*, 47 Bankr. 771, 773 (Bankr. W.D. Wis. 1985). Contrariwise, courts have held that the action can be enjoined if the "primary purpose" of the action is the collection of the debt. *Hansen v. State of Washington, Kitsap County Prosecuting Attorneys (In Re Hansen)*, 48 Bankr. 107, 110 (Bankr. W.D. Wash. 1985); *see also, Underwood v. DeLay (In Re DeLay)*, 48 Bankr. 282, 285 (Bankr. W.D. Mo. 1984) ("A criminal prosecution of the debtor may be in violation of the automatic stay if it is part of an 'aggressive campaign' to collect a debt.") This latter approach affords little more than a slippery, unworkable standard and it should be overruled. The "bad faith" rule enunciated in *Sheldon* is much more practicable.

One of the sentencing options typically available to the state criminal court for passing bad checks is restitution. The Supreme Court has recently held that such debt are not dischargeable. *Kelly v. Robinson*, 107 S. Ct. 353.

⁶¹ Section 362(b)(2).

⁶² *Id.*

⁶³ *Mack v. Commonwealth of Penna., Dept. of Public Welfare (In Re Mack)*, 46 Bankr. 652 (Bankr. E.D. Pa. 1985).

⁶⁴ Section 362(a)(3).

⁶⁵ Section 362(c)(1).

property is generally not liable for satisfaction of prepetition debts during or after the case because the statute excludes debts for alimony, maintenance or child support.⁶⁶ Thus, a creditor holding a claim for alimony, maintenance or child support may proceed against exempted property after the court grants or denies the debtor his discharge.

¶5.830 Subsection 362(b)(3)

The filing of a petition in bankruptcy does not operate as a stay:

(3) under [§ 362(a)], of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title[.]⁶⁷

Section 546(b) states as follows:

(b) The rights and powers of a trustee under sections 544, 545 and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires a seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.⁶⁸

Under 11 U.S.C. § 547(e)(2)(A) a creditor may perfect a security interest in property within ten days after the debtor first has rights in the collateral. If the petition is filed during this ten day period the stay will not bar the creditor from perfecting within the remainder of the ten day period.⁶⁹

¶5.840 Subsections 362(b)(4) and (b)(5)

Subsections 362(b)(4) and (b)(5) mandate that § 362(a) will not act as a stay:

(4) under [§ 362(a)(1)], of the commencement or continuation of an action or proceeding by a governmental unit to enforce such

⁶⁶ 11 U.S.C. § 522(c)(1); 11 U.S.C. § 523(a)(5).

⁶⁷ Section 362(b)(3).

⁶⁸ Section 546(b).

⁶⁹ *Yobe Electric, Inc. v. Graybar Electric Co.*, 728 F.2d 207 (3d Cir. 1984)(postpetition filing of mechanic's lien under Pennsylvania law was not violative of the stay under the facts presented).

governmental unit's police or regulatory power; (5) under [§ 362(a)(2)], of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power[.]⁷⁰

Under these two provisions the stay does not bar a governmental unit from commencing or continuing an action against the debtor or enforcing a judgment against him when the government is acting to enforce its police or regulatory power.

Subsection 362(b)(4) accords a limited exception only to § 362(a)(1) while 362(b)(5) affords a similar exception to § 362(a)(2). The other exceptions to § 362(b) apply to § 362(a) in toto rather than only to specific numbered sections of § 362(a). Query as to the meaning of this limitation. Thus, according to the literal terms of the statute, the stay imposed by the other subsections of § 362(a) is apparently not undercut by § 362(b)(4) and (b)(5).

As stated by Congressman Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights to the House Committee of the Judiciary, in explaining Congress's intent prior to the enactment of § 362(b)(4):

Section 362(b)(4) indicates that the stay under Section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental units police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.⁷¹

These remarks amplify the explanation given in the Committee Report:

Paragraph [362(b)(4)] excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the

⁷⁰ Section 362(b)(4)-(5).

⁷¹ 124 CONG. REC. H32395.

automatic stay. Paragraph [362(b)(5)] makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of a debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.⁷²

The case law has adopted the pecuniary purpose test.⁷³ One court stated that, "Congress indicated in 11 U.S.C. § 362(b), however, that preserving the debtor's estate was not always the dominant goals."⁷⁴

Thus, in order to enforce its police or regulatory power, a government could, for instance, obtain an injunction against the debtor or the estate even though compliance with that injunction would give rise to the expenditure of money of the estate.⁷⁵

¶5.850 Subsections 362(b)(6) and (b)(7)

The bar of § 362(a) does not operate as an injunction:

(6) under [§ 362(a)], of the setoff by a commodity broker, financial institution, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as

⁷² H.R. Rep. No. 595, 95th Cong., 343 reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6299.

⁷³ See, e.g., *Organized Maintenance, Inc. v. Ford* (*In Re Organized Maintenance, Inc.*) 47 Bankr. 791 (Bankr. E.D.N.Y. 1985)(on the basis of this test, pending administrative enforcement proceedings brought by the Secretary of Labor under the Service Contract Act of 1965 was automatically stayed by § 362(a)(and such a proceeding was not insulated by § 362(b)(4)); *In Re Historic Lower Mill Assoc.*, 49 Bankr. 66 (Bankr. W.D.N.Y. 1985)(under § 362(b)(5) the stay did not bar a municipality from enforcing a prepetition judgment that enjoined the debtor from "using or maintaining" a parcel of its realty on the basis that the debtor did not obtain the requisite certificate of occupancy, although the injunction would prove costly to the estate); *U.S. v. Ilco, Inc.*, 48 Bankr. 1016 (Bankr. N.D. Ala. 1985)(suit by the U.S. against the debtor not stayed where the complaint sought an injunction compelling removal of waste by the debtor notwithstanding the fact that such removal would deplete funds of the estate); *Lacoquille Investment Co., Inc. v. Town of Manalapan* (*In Re Lacoquille Investment Co., Inc.*), 44 Bankr. 731 (Bankr. S.D. Fla. 1984)(postpetition enactment of zoning ordinance which decreased the value of the debtor's property did not violate the stay due to § 362(b)(4)); *U.S. v. Standard Metals Corp.*, 49 Bankr. 623 (Bankr. D. Colo. 1985)(entry of judgment against the debtor and in favor of the government on a fine was not stayed due to § 362(b)(4) and (b)(5), the court basing its decision on the distinction between entry of money judgment and its enforcement).

⁷⁴ *U.S. v. Ilco, Inc.*, 48 Bankr. at 1023.

⁷⁵ *Penn Terra, Ltd. v. Dept. of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984)(injunction to abate environmental hazard).

defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under [§ 362(a)], of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements[.]⁷⁶

Subsection 362(b)(7) was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984. Further discussion of these provisions is beyond the scope of this work.

¶5.860 Subsection 362(b)(8)

Under § 362(b)(8) the filing of a petition does not operate as a stay:

(8) under [§ 362(a)], of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units[.]⁷⁷

¶5.870 Subsection 362(b)(9)

Under § 362(b)(9) the stay does not enjoin:

(9) under [§ 362(a)], the issuance to the debtor by a governmental unit of a notice of a tax deficiency[.]⁷⁸

⁷⁶ Section 362(b)(6)-(7).

⁷⁷ Section 362(b)(8).

⁷⁸ Section 362(b)(9).

Also, § 505(c) provides:

(c) Notwithstanding section 362 of this title, after determination by the court of a tax under this section, the governmental unit charged with responsibility for collection of such tax may assess such tax against the estate, the debtor, or a successor to the debtor, as the case may be, subject to any otherwise applicable law.⁷⁹

Proceedings before the tax court would nonetheless be stayed.⁸⁰

¶5.880 Subsection 362(b)(10)

The injunction of § 362(a) does not operate as a stay:

[10] under [§ 362(a)], of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.⁸¹

This provision was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984 although the subsection was denominated “§ 362(b)(9),” notwithstanding the pre-existence of another “§ 362(b)(9).”

The landlord's right of repossession might still be restricted under 11 U.S.C. § 108(b) if the lease, by its terms, expired during the 60 day period following the filing of the petition. In that situation, if the terms of the lease provide a sufficient basis by which § 108(b) would be triggered, the debtor would still have a right to possession until at least the end of the 60 day period. See, also the brief discussion, below, on § 108(b) under the analysis on the stay and the tolling of time.

¶5.890 Subsection 362(b)(11)

Under § 362(b)(11) the stay does not act as a bar:

(11) under [§ 362(a)], of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument.⁸²

As with § 362(b)(10), this provision was also added to the statute by the Bankruptcy Amendments and Federal Judgeship Act of 1984, and though designated “§ 362(b)(10),” to preserved the format of §362(b) it should probably be § 362(b)(11).

⁷⁹ Section 505(c).

⁸⁰ Section 362(a)(8).

⁸¹ Section 362(b)(10).

⁸² Section 362(b)(11).

¶6.000 AIRCRAFT VESSELS AND EQUIPMENT

As to the holders of certain interests in aircraft, ships and specific aircraft parts under § 1110 in a chapter 11 case, the duration of the automatic stay is generally limited to 60 days after the filing of the petition. Section 1110 states as follows:

(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliance, or spare parts, as defined in section 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301), or vessels of the United States, as defined in subsection B(4) of the Ship Mortgage Act, 1920 (46 U.S.C. 911(4)), that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, as the case may be, to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or any power of the court to enjoin such taking of possession unless—

(1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and

(2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—

(A) that occurred before such date is cured before the expiration of such 60-day period; and

(B) that occurs after such date is cured before the later of—

(i) 30 days after the date of such default; and

(ii) the expiration of such 60 day period.

(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.⁸³

⁸³ Section 1110.

The provision, applicable only in chapter 11, expressly states that § 362 does not apply as to the collateral described and that the court's injunctive powers are limited by the terms of § 1110. The legislative history contains provisions reflective of portions of bills which were enacted, and, thus, reliance on those specific parts of the history would be unjustified.

¶7.000 THE TOLLING OF TIME IS NOT STAYED BY SECTION 362(A)

The majority rule is that the running of time is not affected by the *automatic stay*.⁸⁴ Recourse may nonetheless be accorded under certain circumstances through § 108(b):

(b) Except as provided in [§ 108(a)], if applicable nonbankruptcy law, a order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1301 of this title may file any pleading, demand, notice or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee [or debtor in possession, 11 U.S.C. § 1107] may only file, cure, or perform, as the case may be, before the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 60 days after the order for relief.⁸⁵

Another view was expressed in *Moody v. Amoco*.⁸⁶ The court held "that section 108(b) does not apply to curing defaults in executory contracts. Section 365 specifically governs the time for curing defaults in executory contracts, and thus, it controls here."⁸⁷ This author questions the result in *Moody* since the language of 11 U.S.C. § 108(b) clearly states that if

⁸⁴ *In Re Players' Pub, Inc.*, 45 Bankr. 387, 392 (Bankr. D. Mass. 1985)(The stay does not bar a lease from lapsing postpetition according to its own terms).

⁸⁵ *Johnson v. First National Bank of Montevideo, Minn.*, 719 F.2d 270 (8th Cir. 1983)(Where state law authorized fixed redemption period following foreclosure of lien on realty, § 362(a) did not toll the running of the time period; under § 105(a) the bankruptcy court lacked power to stay the running of the period; under § 108(b) the debtor has at least 60 days to redeem.), *cert. denied*, 104 S. Ct. 1015; *General Motors Acceptance Corp. v. Morgan (In Re Morgan)*, 23 Bankr. 700 (Bankr. E.D. Pa. 1982)(§ 108(b) applies to redemption periods rather than § 362(a)); *In Re G-N Partners*, 48 Bankr. 462 (Bankr. D. Minn. 1985)(recognizing the general rule that the running of time is not tolled by § 362(a), but holding that although the debtor filed a petition under chapter 11 only minutes prior to the expiration of an option contract to purchase realty, under 11 U.S.C. the expiration was automatically extended for sixty days); *In Re Amant*, 41 Bankr. 156 (Bankr. D. Conn. 1984)(*contra Johnson*,) (collecting cases).

⁸⁶ *Moody v. Amoco*, 734 F.2d 1200, 1215 (7th Cir.), *cert. denied*, 105 S. Ct. 386 (1984).

⁸⁷ *Id.* at 1215.

"an *agreement* fixes a period within which the debtor . . . may . . . cure a default . . .," then the debtor has until the later of the end of such period or 60 days after the filing of the petition. § 108(b) (emphasis added). The term "agreement" would seem to include "contracts."

¶8.000 IMPLICIT EXCEPTION TO SECTION 362(A) - ACTIONS PENDING IN THE BANKRUPTCY COURT

Although not expressly stated in § 362(b), actions may be commenced against the debtor or the estate, in the bankruptcy court where the debtor's bankruptcy petition is pending so long as the action is parasitic to that bankruptcy case. The action is parasitic only if the matter may properly be commenced under the same bankruptcy caption as the petition although the institution of an adversary case bearing the adversary caption and that bankruptcy petition caption would also be allowable. Any other result would lead to an unnecessary multiplication of proceedings. Parties would seek relief from the stay prior to the filing of any action against the debtor or the estate that would otherwise be barred by § 362(a). Thus, a creditor seeking a reclamation of his goods against a debtor may commence suit in the bankruptcy court where the petition is pending without the need to seek relief from the stay.

¶9.000 THE IMPLICIT EXCEPTION TO SECTION 362(A) IS NOT APPLICABLE TO ACTIONS REMOVED TO THE BANKRUPTCY COURT

When an action is removed to the bankruptcy court from another federal court or a state court, the stay is not implicitly modified even though the matter is proceeding under the same bankruptcy caption as the bankruptcy petition. At least this is the suggestion provided by the Advisory Committee Notes to Bankruptcy Rule 9027 on removal. "If the claim or cause of action which is removed to the bankruptcy court is subject to the automatic stay of § 362 of the Code, the litigation may not proceed in the bankruptcy court until relief from the stay is granted."⁸⁸ A contrary result would apparently prompt creditors to file applications for removal on actions stayed in another forum by § 362(a), rather than seek relief from the automatic stay, since the removal application is effective immediately on filing, while a motion for relief from the stay requires court action following an opportunity for a hearing.

Removal is authorized under 28 U.S.C. § 1452 and, as mentioned above, Bankruptcy Rule 9027.

⁸⁸ Bankruptcy Rule 9027 advisory committee notes.

¶10.000 AUTOMATIC STAY BARS THE CONTINUATION OF THE APPELLATE PROCESS

Several U.S. Courts of Appeals have held that the filing of bankruptcy by one party to the appellate processes bars the continuation of that appeal.⁸⁹

II. THE SCOPE OF THE AUTOMATIC STAY MAY BE AUGMENTED UNDER 11 U.S.C. SECTION 105(A) ON MOTION OF A PARTY IN INTEREST

¶11.000 AUGMENTATION OF THE STAY UNDER 11 U.S.C. § 105(A)

Even though an action may not be barred by the automatic stay, the court has the power under § 105 to prohibit a party from continuing a present or proposed course of action.⁹⁰ The case law in this area has not yet firmly established the limits of the courts' discretion in most areas of this field, yet it appears that courts are reluctant to go beyond the scope of § 362(a) in the absence of a significant, if not extraordinary, showing.⁹¹

Under the doctrine of *Younger v. Harris*,⁹² it seems fairly well established by the case law that a bankruptcy court may not enjoin the litigants in criminal matters in the absence of bad faith, harassment or the like.⁹³ Thus, for example, attempts to halt criminal prosecutions for bounced check charges are generally not likely to succeed.

⁸⁹ *Ellison v. Northwest Engineering Co.*, 707 F.2d 1310, 1311 (11th Cir. 1983)(where one party to an appeal filed a petition for relief under the Bankruptcy Code, the Eleventh Circuit held that the stay barred the court from issuing an opinion in the appeal absent relief from the stay); *Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3d Cir. 1982)("[S]ection 362(a) should be read to stay all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or appellee.") (emphasis in original); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir. 1983)(same).

⁹⁰ *Compton Corp. v. U.S. Dept. of Energy (In Re Compton Corp.)* 40 Bankr. 880, 882 (Bankr. N.D. Tex. 1984); *In Re Anje Jewelry Co.*, 47 Bankr. 485, 486 (Bankr. E.D.N.Y. 1983); S. Rep. No. 989, 95th Cong., 2d Sess. 51 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5837.

⁹¹ *Briggs Transportation Co. v. International Brotherhood of Teamsters*, 739 F.2d 341 (8th Cir. 1984)(although the bankruptcy court authorized the debtor to abrogate its collective bargaining agreement with the debtor, the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, barred the bankruptcy court's issuance of an injunction against the union's pickets), *cert. denied*, 105 S. Ct. 295 (1984); *Heaven Sent Ltd. v. Commercial Union Ins. Co. (In Re Heaven Sent Ltd.)*, 37 Bankr. 597 (Bankr. E.D. Pa. 1984)(section 105 did not give the bankruptcy court power to compel an insurer to renew an insurance policy where the policy did not reserve to the debtor such right in the absence of bankruptcy); *Bogey's Barn, Ltd. v. Indiana Ins. Co. (In Re Bogey)*, 47 Bankr. 555 (Bankr. S.D. Fla. 1985)(same).

⁹² *Younger v. Harris*, 401 U.S. 37 (1971).

⁹³ *Davis v. Sheldon*, 691 F.2d 176 (3d Cir. 1982); *Barnette v. Evans*, 673 F.2d 1250 (11 Cir. 1982).

The bankruptcy court may enjoin under 11 U.S.C. § 105(a) federal regulatory proceedings "when those proceedings 'threaten' the assets of the debtor's estate."⁹⁴

Postpetition suits against the trustee or debtor in possession may be brought under 28 U.S.C. § 959(a) which provides as follows:

(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity powers of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of this right to trial by jury.⁹⁵

The court may enjoin such a suit under § 105(a) in limited circumstances:

The harmonizing construction that we adopt, one which accords with the legislative history of § 959(a), is that a court action against reorganization trustees relating to business activities of the bankrupt carried on by the trustee may proceed unless the bankruptcy court, exercising sound discretion, finds that the action would embarrass, burden, delay or otherwise impede the reorganization proceeding.⁹⁶

III. VIOLATIONS OF THE STAY: EFFECTS AND REMEDIES

¶12.000 VIOLATIONS OF THE STAY MAY BE REDRESSED THROUGH CIVIL CONTEMPT

Violations of the automatic stay may be redressed through an action for civil contempt. *Fidelity Mortgage Investors v. Camelia Builders, Inc.*⁹⁷ A finding of civil contempt must be predicated on a specific and definite order of the court.⁹⁸ The automatic stay of § 362(a) is effectively a court order with sufficient specificity for purposes of contempt.⁹⁹ Contempt can

⁹⁴ N.L.R.B. v. Superior Forwarding, Inc., 762 F.2d 695, 698 (8th Cir. 1985).

⁹⁵ Section 959(a).

⁹⁶ Hudson River Sloop Clearwater v. Revere Copper Products (*In Re Reverse Copper and Brass, Inc.*) 32 Bankr. 725, 728 (Bankr. S.D. N.Y. 1983)(quoting *Jaytee-Pennel Co. v. Bloor* (*In Re Investors Funding Corp.*), 547 F.2d 13, 16 (2d Cir. 1976)(cites omitted)).

For a discussion of the use of § 105(a) to reinstitute the stay after it has lapsed under § 362(e) or the use of 105(a) to preclude such a lapse see *infra* under § 362(e).

⁹⁷ *Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093 (1977).

⁹⁸ *Camelia*, 550 F.2d at 51; *Abt. v. Household Finance Co.* (*In Re Abt*), 2 Bankr. 323, 325 (Bankr. E.D. Pa. 1980).

⁹⁹ *Camelia*, 550 F.2d at 51; *Assoc. Hobby Manufacturers, Inc. v. Rohde & Liesenfeld, GMBH & Co.* (*In Re Assoc. Hobby Manufacturers, Inc.*), 33 Bankr. 959, 962 (Bankr. E.D. Pa. 1983).

be successfully charged only if the creditor had knowledge of the stay.¹⁰⁰

A creditor's knowledge that a bankruptcy petition was filed, absent concomitant knowledge that such a filing gives rise to a stay, is not sufficient although there is contrary authority.¹⁰¹ Nonetheless, some courts previously held that a party's failure to rectify an unwitting violation of the stay after receiving knowledge of the stay may constitute contempt.¹⁰² With the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, § 362(a)(3) was amended to stay the "exercise control over property of the estate." The amendment apparently mandates that parties holding property of the estate turnover that property to the debtor, or if applicable, the trustee, or risk a finding of contempt for violating § 362(a)(3). Nonetheless, § 362(a)(3) may now be at odds with the turnover requirements of § 542.¹⁰³ Thus, the *Behm* line of cases is apparently in accord with the amendment while the *Abt* line is now in derogation of it.

To prevail in an action for contempt the debtor must prove the pertinent facts under the "clear and convincing" standard of evidence rather than the more common civil standard of a "preponderance of the evidence."¹⁰⁴ Nevertheless, a violation of the automatic stay will not support a finding of contempt in all cases.¹⁰⁵ Each violation of the stay must be considered in its entirety, with due consideration given to the underlying facts, prior to a finding of contempt.¹⁰⁶ The power of contempt should generally be reserved for actions evincing a contumacious frame of mind.¹⁰⁷

Good faith does not immunize a party from civil contempt for violating a court order.¹⁰⁸ This rule is applicable in bankruptcy,¹⁰⁹ and apparently

¹⁰⁰ *Camelia*, 550 F.2d at 51; *In Re Hardy*, 39 Bankr. 64, 66 (Bankr. E.D. Pa. 1984).

¹⁰¹ See, e.g., *Superior Propane v. Zartun (In Re Zartun)*, 30 Bankr. 543, 546 (Bankr. 9th Cir. 1983)(knowledge of the filing, abasent knowledge of the stay, is a sufficient basis for requisite "knowledge").

¹⁰² *In Re Behm*, 44 Bankr. 811 (Bankr. W.D. Wis. 1984); *Miller v. Savings Bank of Baltimore (In Re Miller)*, 22 Bankr. 479 (D. Md. 1982), *aff'd*, 10 Bankr. 778 (Bankr. D. Md. 1981); *Abt v. Household Finance Co. But see (In Re Abt)*, 2 Bankr. 323, 325 (Bankr. E.D. Pa. 1980).

¹⁰³ See *supra* text accompanying notes 44-47.

¹⁰⁴ *Quinter v. Volkswagen of America*, 676 F.2d 969, 974 (3d Cir. 1982).

¹⁰⁵ *Porter v. Goodyear Employees Credit Union (In Re Porter)*, 25 Bankr. 425, 527 (Bankr. D. Vt. 1982); *Ramage v. Ramage (In Re Ramage)*, 39 Bankr. 37, 39 (Bankr. E.D. Pa. 1984).

¹⁰⁶ *Porter*, 25 Bankr. at 427; *Ramage*, 39 Bankr. at 39.

¹⁰⁷ *Revere Copper Products, Inc. v. Hudson River Sloop Clearwaters, Inc. (In Re Revere Copper and Brass, Inc.)*, 29 Bankr. 584, 589 (Bankr. S.D.N.Y. 1983), *aff'd* 32 Bankr. 725 (Bankr. S.D.N.Y. 1983); *Ramage*, 39 Bankr. at 39.

¹⁰⁸ *McLean v. Central States, Southeast and Southwest Areas Pension Fund*, 762 F.2d 1204, 1210 (4th Cir. 1985).

¹⁰⁹ *Id.*

also applicable for violations of the automatic stay. Nonetheless, a party will not be held in contempt unless he violates a "specific order of the court while possessing actual knowledge of that order."¹¹⁰

The above case law developed in the absence of § 362(h), which was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984. This provision states that an "individual" injured by a willful violation of the automatic stay shall recover actual damages, including costs and attorney's fees, and in appropriate circumstances, may recover punitive damages. Query as to whether the courts will apply the above case law in interpreting § 362(h).

Lastly, the term "individual" which appears in § 362(h) is used elsewhere in the Bankruptcy Code to mean only living, breathing human beings; corporations, partnerships and the like are excluded.¹¹¹ Since § 362(h) was added by the 1984 amendments to the Bankruptcy Code in 1978, a lack of parallelism between the meaning of an "individual" in the portions added by the 1984 amendment and the original 1978 Bankruptcy Code may be inadvertent due to the passage of the two statutes by different Congresses. To this author there is no logic or purpose in limiting the definition of an "individual" in § 362(h) to living, breathing entities, and it is expected that the case law will ultimately support the broader definition.¹¹² Furthermore, assuming the definition of an "individual" in § 362(h) is held to be restricted to living beings, the case law cited above has not been expressly "overruled" by that provision; nonetheless, a court may possibly hold that it is implicitly in conflict with § 362(h) and that the case law is no longer valid on whether non-individuals may seek contempt. In the absence of a court ruling that the provisions are in conflict, a debtor could apparently seek recovery either under § 362(h) or the progeny of *Camelia*.

¶13.000 ACTIONS IN VIOLATION OF THE STAY, THOUGH NOT CONTUMACIOUS,
ARE VOID

Actions taken in violation of the automatic stay are generally void and of no legal effect, notwithstanding the actor's ignorance of the filing of the petition in bankruptcy as was held in *Kalb v. Feuerstein*.¹¹³ This is

¹¹⁰ *Assoc. Hobby Manufacturers, Inc. v. Rodhe & Liesenfeld, GMBH & Co. (In Re Assoc. Hobby Manufacturers, Inc.)*, 33 Bankr. 959, 962 (Bankr. E.D. Pa. 1983).

¹¹¹ See, e.g., § 109(e)(only an "individual" may file for relief under chapter 13).

¹¹² See, e.g., *Tel-A-Communications Consultants, Inc. v. Auto-Use (In Re Tel-A-Communications Consultants, Inc.)*, 50 Bankr. 250, (Bankr. D. Conn. 1985)(where a contempt action was brought against a creditor who repossessed the debtor's auto, the court held the § 362(h) is not limited to living, breathing entities).

¹¹³ *Kalb v. Feuerstein*, 308 U.S. 433 (1940); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982); *Emerson Quiet Kool Corp. v. Marta Group, Inc. (In Re Marta Group, Inc.)*, 33 Bankr. 634, 639 (Bankr. E.D. Pa. 1983); *In Re Behm*, 44 Bankr. 811,

true even in the absence of a finding of civil contempt. A creditor wishing to validate acts performed in violation of the stay may move the court in an appropriate situation for annulment of the automatic stay under § 362(d) as discussed below. Certain statutory exceptions exist to the rule of *Kalb v. Feuerstein*.¹¹⁴

IV. MODIFICATION AND TERMINATION OF THE AUTOMATIC STAY

¶14.000 RELIEF FROM THE AUTOMATIC STAY ON REQUEST OF A PARTY IN INTEREST

¶14.100 *Jurisdiction and the Proper Court to Grant Relief From the Stay*

The Bankruptcy Court has jurisdiction to hear actions for relief from the automatic stay and enter final orders thereon unless the district court of that district has withdrawn from the bankruptcy court the reference of the entire bankruptcy case or a portion of it embracing a creditor's motion for relief from the stay.¹¹⁵ Generally, the reference will not have been withdrawn. Thus, the bankruptcy court where the bankruptcy petition was filed is generally the place to seek relief from the stay.¹¹⁶ If the reference over that aspect of the case, or the entire case, has been withdrawn, the district judge to whom the case has been withdrawn and assigned is the party from whom to seek relief. Even though a bankruptcy case is pending in a bankruptcy court of a particular United States District Court, a judge of that district court typically may not grant relief from the stay as to any matter, including civil actions pending in his court against the debtor, unless the reference of that aspect of the bankruptcy case has been withdrawn and assigned to that district judge.¹¹⁷ A district court other than one where the petition is pending may not grant relief from the automatic stay.¹¹⁸

¶14.200 *Procedural Aspects of Requesting Relief From the Automatic Stay*

¶14.210 The Framework of the Bankruptcy Rules

Relief from the stay may be granted on motion under Bankruptcy Rules 4001(a) and 9014. Relief is no longer sought by complaint as was past

813 (Bankr. W.D. Wis. 1984); *Organized Maintenance, Inc. v. Ford* (*In Re Organized Maintenance, Inc.*), 47 Bankr. 791, 793 (Bankr. E.D.N.Y. 1985); 2 *Collier on Bankruptcy* (P)362.11 (15th ed. 1983).

¹¹⁴ See, e.g., 11 U.S.C. §§ 549(c)-(d).

¹¹⁵ 28 U.S.C. §§ 157(b)(2)(G); 1334 local order of reference from local district court.

¹¹⁶ *Erti v. Paine Webber*, (*In Re Baldwin Corp.*), 765 F.2d 343 (2d Cir. 1985); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 63 (6th Cir. 1983).

¹¹⁷ *NLT Computer Services Corp. v. Capital Computer Systems, Inc.*, 755 F.2d 1253, (6th Cir. 1985).

¹¹⁸ *In Re Baldwin-United Corp.*, 765 F.2d 343.

practice under the former Bankruptcy Rules.¹¹⁹ There is no charge for filing the motion. As stated in Bankruptcy Rules 4001 and 9014:

Rule 4001. Relief from Automatic Stay; Use of Cash Collateral

(a) Request for Relief From Stay or To Use Cash Collateral. A request for relief from an automatic stay provided by the Code or for the use of cash collateral pursuant to § 363(c)(2) shall be made in accordance with Rule 9014.

(b) Final Hearing on Stay. The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing is commenced pursuant to § 362(e)(2) unless within that time the court denies the motion for relief from the stay.

(c) Ex Parte Relief from Stay. Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (1) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or his attorney can be heard in opposition, and (2) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such person or persons a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-37, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069 and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII apply. A person

¹¹⁹ See former Bankruptcy Rule 701.

who desires to perpetuate testimony may proceed in the same manner as provided in Rule 9027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.¹²⁰

¶14.220 Service of the Motion for Relief From the Stay

As is apparent from Rule 9014, the motion for relief from the automatic stay must be served on the debtor and, if one is in the case, also on the trustee.¹²¹ According to the strict letter of the Rules the debtor and the trustee are the proper objects of service and *not their respective counsel*. A copy of the motion must be served on each respondent.

The means for serving the motion for relief from the stay is provided by the Bankruptcy Rules. Bankruptcy Rule 9014 indicates that Bankruptcy Rule 7004 is applicable in contested matters which include motions for relief from the stay. Personal service of the motion may be effected by any person not less than 18 years of age who is not a party.¹²² Service may be implemented by any method of service authorized under Fed. R. Civ. P. 4(d) or by first class mail, postage prepaid under Bankruptcy Rule 7004(b). Service on an individual who is not an infant or incompetent may be made by mailing a copy of the summons and the motion to the defendant's "dwelling house or usual place of abode or to the place where he regularly conducts his business or profession."¹²³ Service on a domestic or foreign corporation or upon a partnership or other unincorporated association may be completed by mailing a copy of the summons and the motion "to the attention of an officer, a managing or general partner, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."¹²⁴ Bankruptcy Rule 7004 also provides for service of process on other types of defendants but the provisions summarized here will suffice in all but a handful of situations.

¹²⁰ Bankruptcy Rules 4001 and 9014.

¹²¹ First National Mortgage Assoc. v. DiBona (*In Re DiBona*), 7 Bankr. 798 (Bankr. E.D. Pa. 1980)(The trustee is an indispensable party in an action for relief from the stay).

¹²² Bankruptcy Rule 7004(a).

¹²³ Bankruptcy Rule 7004(b)(1).

¹²⁴ Bankruptcy Rule 7004(b)(3).

¶14.230 No Response to the Motion for Relief From the Stay Under Section 362(d) Required in the Absence of Court Rule or Court Order

Under Rule 9014 the debtor and the trustee are not required to answer a creditor's motion for relief from the automatic stay in the absence of a specific order or rule of court to the contrary.¹²⁵ In one questionable case from a federal district court, a local rule of the bankruptcy court which mandated an answer to a motion for relief from the stay was held invalid as being in derogation of Rule 9014.¹²⁶ As a consequence, the bankruptcy court for that district now enters, as a matter of course on each motion for relief from the stay, an order mandating an answer and fixing a hearing date for the motion.

In the absence of an answer and both a court order and a rule of court mandating such an answer, the creditor would be required to appear at the scheduled hearing on the motion if he wished to oppose it.

¶14.240 Opposition to Motion for Relief from the Co-Debtor Stay under Section 1301 Requires Filing of an Answer

In chapter 13, when a creditor requests relief from the stay of actions against one to whom the co-debtor stay of 11 U.S.C. § 1301 applies, the failure to file an answer within 20 days after the filing of the motion causes the co-debtor stay to lapse as to the conduct proposed in the motion.¹²⁷

¶14.250 Effect of Conversion of the Case on Proper Joinder of Parties on Request for Relief From the Stay

As stated above the proper defendants in an action for relief from the automatic stay are the debtor, and if one is in the case, also the trustee. If a case is converted from one chapter to another, the trustee in the former aspect of the case is discharged as a matter of law and, if applicable, a new trustee is appointed in the new chapter. The question often arises on whether the granting of the motion for relief from the stay against an entity who is no longer a proper party in the case is binding against the current proper parties in the proceeding. For instance, if a creditor prevails on a motion for relief from the stay in a chapter 7 proceeding against the debtor and the chapter 7 trustee, is that relief still extant if the debtor converts the case to a chapter 13 proceeding thereby triggering the discharge of the chapter 7 trustee in favor of the appointment of a chapter 13 trustee? The cases are split.¹²⁸

¹²⁵ But see discussion on the co-debtor stay under § 1301, *infra* note 127 and accompanying text; a request for relief from which mandates an answer if the relief is opposed.

¹²⁶ Newton Savings Assoc. v. Stinson, No. 83-5291, slip op. (E.D. Pa. Feb. 6, 1984).

¹²⁷ 11 U.S.C. § 1301(d).

¹²⁸ See, e.g., Perkins v. Perkins (*In Re Perkins*), 36 Bankr. 618 (Bankr. M.D. Tenn.

¶14.300 *The Modes of Granting Relief From the Stay*

Relief from the automatic stay may be granted under § 362(d) which states as follows:

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
- (2) with respect to a stay of an act against property under [§ 362(a)], if
 - (A) the debtor does not have an equity in such property; and
 - (B) such property is not necessary to an effective reorganization.¹²⁹

Under the terms of § 362(d)(1) and (d)(2) an important distinction is drawn. Relief under § 362(d)(2) may only be granted "with respect to a stay of an act against property" of the estate. The language of § 362(d)(1) is not thusly restricted and may be used as a basis for relief with respect to a stay of an act against property of the estate or any other act.

As provided by § 362(d) the court may grant relief from the automatic stay "such as by terminating, annulling, modifying, or conditioning such stay. . . ." The quoted language obviously provides the court with four means to grant relief, although the presence of the expression "such as by" apparently indicates that the four stated routes to relief are not exhaustive of the court's power but are instead illustrative.

In commencing an examination of these four modes of relief, a "termination" of stay apparently means a complete suspension of the stay thus allowing all creditors and other parties to proceed in any lawful manner against the debtor, his property or the bankruptcy estate. Since one of the primary purposes of the Bankruptcy Code is to provide the debtor with a "breathing spell" from creditors, which would necessarily end on termination of the stay, this remedy is rarely, if ever, used. A "modification" of the stay is the most often granted form of relief from the stay since it cancels the stay as to one entity or as to one particular act while still giving the debtor a "breathing spell" from the remainder of his creditors. For example, the court may grant a mortgage holder relief to pursue his state foreclosure remedies against a parcel of encumbered property, with the court leaving the remainder of the stay intact.

1983)(consent of chapter 13 trustee to relief from the stay was not binding on a chapter 7 trustee after conversion); *A.E. Landvoight, Inc. v. Williams (In Re Williams)*, 40 Bankr. 366 (Bankr. D. Md. 1984)(where a request for relief from the stay was granted in a chapter 13 case, such relief was held binding on the chapter 7 trustee after conversion of the case, notwithstanding the fact that according to local court rule a chapter 13 trustee is not a party in interest in an action for relief from the stay).

¹²⁹ 11 U.S.C. § 362(d).

The "conditioning" of the stay would most typically provide for a "modification" of the stay on the triggering of an act or omission. For instance, the court may order that the stay will be automatically lifted as to a mortgage in the event that the debtor fails at some time in the future to remain current in his payments on the mortgage debt. This is similar to the situation in which the bankruptcy judge, at a hearing, grants relief from the stay although the creditor has agreed with the debtor that the creditor will not pursue such a course of action until the debtor defaults under a repayment schedule (as opposed to a confirmed chapter 11 or 13 plan). This occurred in *In Re Bricker Systems, Inc.*¹³⁰ A conditioning of the stay or a utilization of the method employed in *Bricker* spares the creditor the need to return to bankruptcy court for another hearing or for a subsequent presentation of an order granting relief from the stay, thus saving the creditor precious time.¹³¹

The least explored option among the four alternatives is an "annulment" of the stay. In effect, an "annulment" extinguishes the stay *ab initio* as to a particular creditor or a particular act, although the stay conceivably could be annulled in toto as to all parties and acts. Of the four means of granting relief from the automatic stay, only annulment reaches back in time to reverse the prior effect of the stay. A "termination" or "modification" is effective only upon entry on the docket of the order granting such relief. A "conditioning" of the stay would generally preserve the full effect of the stay as of the time of the entry of the order granting relief but would be subject to automatic "modification" effective prospectively on the occurrence of some future triggering act or omission.¹³²

Annulling the automatic stay may have significant utility. For instance, a creditor may conclude foreclosure proceedings against a parcel of the debtor's realty without knowing that the debtor filed for bankruptcy. The debtor, realizing that foreclosure has occurred and that he could not provide adequate protection to the encumbrance holder, decides

¹³⁰ *In Re Bricker*, 44 Bankr. 952 (Bankr. E.D. Wis. 1984).

¹³¹ On a conditioning of the stay see, e.g., *Browning v. Navarro*, 37 Bankr. 201 (N.D. Tex.1983)(district court's affirmance of bankruptcy court's conditioning of relief from the stay on parties' consent to agreement under which a contested matter would be tried in state court), *rev. on other grounds*, 743 F.2d 1069 (5th Cir. 1984).

¹³² See, e.g., *Frankford Trust Co. v. Dublin Properties (In Re Dublin Properties)*, 27 Bankr. 506, 506-07 (Bankr. E.D. Pa. 1983)(conditioning of the stay contingent on parties' execution of a mortgage note); *Federal National Mortgage Assoc. v. Cosby (In Re Cosby)*, 22 Bankr. 682, 683 (Bankr. E.D. Pa. 1982)("[m]odification of the automatic stay may be conditioned on the [debtor's] payment of reasonable attorneys' fees and other costs as may be allowed by the court" for the creditor's filing of the motion for relief from the stay); *Imperial Bank v. El Patio, Ltd. (In Re El Patio Ltd.)*, 6 Bankr. 518 (Bankr. C.D. Cal. 1980)(continuation of the stay contingent on the debtor's turnover of rents); *Ideal Roofing and Sheet Metal Works, Inc. v. M. R. Harrison Constr. Corp. (In Re Ideal Roofing & Sheet Metal Works, Inc.)*, 9 Bankr. 2, 3 (Bankr. S.D. Fla. 1980).

that there is no point in seeking turnover. As stated above, actions taken in violation of the stay are void and without legal effect. Although the creditor would have possession of the property, there would be a cloud on the title which might deter purchasers and title insurers. An annulment of the stay would go a long way toward alleviating their apprehension.¹³³

¶14.400 *Substantive Grounds for Granting Relief From the Automatic Stay*

¶14.410 Definitions

Prior to discussing the merits of granting relief from the stay some definitions must be provided.

¶14.411 *Amount of the Debt*

When relief is sought by a secured party intending to foreclose on collateral, the amount of the indebtedness must often be established. The pertinent provision of the Bankruptcy Code is 11 U.S.C. § 506(b):

(b) To the extent that an allowed secured claim is secured by property the value of which, after recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.¹³⁴

Note that the language of § 506(b) expressly allows only for certain charges arising under *an agreement*. The amount of the debt includes the outstanding principal debt, interest currently due, and any costs and attorney fees accorded by the document creating the security interest.¹³⁵ The reasonable costs of foreclosure likewise increase the amount of the movant's debt.¹³⁶

¹³³ See, e.g., *Albany Partners Limited v. Westbrook*, (*In Re Albany Partners*), 749 F.2d 670 (11 Cir. 1984); *Rosenfeld v. City of New York* (*In Re Silverman*), 45 Bankr. 892 (S.D.N.Y. 1985)(stay annulled under Bankruptcy Act of 1898); *Sundstrom Mortgage Co., Inc. v. 2218 Bluebird Limited Partnership* (*In Re 2218 Bluebird Limited Partnership*), 41 Bankr. 540, 543 (Bankr. S.D. Cal. 1984)(stay annulled after the debtor filed multiple, successive petitions in bad faith under chapter 11 merely for the purpose of invoking the automatic stay without an intent or ability to reorganize).

¹³⁴ 11 U.S.C. § 506(b) (1985).

¹³⁵ 11 U.S.C. § 506(b).

¹³⁶ *Crocker National Bank v. American Mariner Ind., Inc.*, 724 F.2d 426, at 435 n.12 (9th Cir. 1984)(the court stated that the expects costs of foreclosure must be adequately protected); *Vlahos v. Pitts* (*In Re Pitts*), 2 Bankr. 476, 478 (Bankr. C.D. Cal. 1979); *Whitinsville Savings Bank v. Grundstrom* (*In Re Grundstrom*), 14 B.R. 791, 792 (Bankr. D. Mass. 1981); *La Jolla Mortgage Fund v. Rancho El Cajon Assoc.*, 18 B.R. 283, 289 (Bankr. S.D. Cal. 1982); *In Re Colonial Mortgage Service Co. v. Dallasta* (*In Re Dallasta*), 7 Bankr. 883, 885 (Bankr. E.D. Pa. 1980); *In Re Polzin*, 49 B.R. 370 (Bankr. D. Minn. 1985).

Although not all courts which have construed § 506(b) have spoken on the point, there is a question as to whether late charges and related obligations secured under a loan will augment a secured claim when the loan is oversecured.¹³⁷ In *Ireson* the court held that late charges arising under a loan are penalties and as such will not increase the amount of a creditor's secured claim. The rationale was that such charges were not reasonable and necessary costs but rather penalties. Query whether reasonable and necessary late charges would be allowable.

Where the interest rate under a mortgage jumps to a higher rate on default, the court may opt to use the higher rate for the post-default period in fixing the amount of the debt.¹³⁸ In the absence of any provision in the mortgage expressing a post-default rate of interest, the bankruptcy court may apply a reasonable post maturity rate.¹³⁹ That rate may reflect that a mortgagor who is unable to pay a mortgage at maturity is a greater risk than one not in default.¹⁴⁰ In federal districts which have not adopted these positions, it is rationally possible for a court to establish a rule in all cases that the post-default rate will not vary from the pre-default rate. Such a rule may even be extended to void any contractually expressed post-default rate at odds with the pre-default rate. Unmatured interest is not includable in the indebtedness.¹⁴¹ Taxes which are accorded a lien on the property at issue must be considered in fixing the amount of equity in the property.¹⁴² On a claim for taxes which is secured by property of the estate, the question is whether the claim is augmented by postpetition interest, penalties and interest on the penalties. Some courts have stressed the point mentioned above, that under § 506(b) a secured claim is augmented by interest, and that any reasonable fees, costs or charges under a secured claim augment the claim only to the extent those charges arise under an *agreement*. Hence, under this view interest and costs arising under force of statute on nonconsensual liens would not augment a secured claim. Consequently, under this view when a tax lien attaches to property of the estate prior to the filing of a petition, postpetition interest does not augment the secured claim, and in fact, under § 506(b) it does not accrue.¹⁴³ As a collateral matter, some allowance for payment of the postpetition accrual of interest on prepetition tax liens may be

¹³⁷ See, e.g., *Ireson v. Matt Financial Corp. (In Re Ireson)*, 48 Bankr. 711 (Bankr. W.D. Va. 1985).

¹³⁸ *In re W. S. Sheppley & Co.*, 45 B.R. 473, 478-79 (Bankr. N.D. Iowa 1984).

¹³⁹ *In Re Hempstead Realty Assoc.*, 47 Bankr. 998, 999 (Bankr. S.D.N.Y. 1985).

¹⁴⁰ *Bloor v. Hartsdale Assoc., (In Re Hartsdale Assoc.)*, 452 F. Supp. 67, 69 (S.D.N.Y. 1978).

¹⁴¹ Section 502(b)(2).

¹⁴² *In Re Kertennis*, 40 Bankr. 895, 898 (Bankr. D. R.I. 1984).

¹⁴³ *In Re Boston and Maine Corp. (Appeal of the City of Cambridge)*, 719 F.2d 493 (1st Cir. 1983).

required in a confirmable plan under chapter 13 or 11.¹⁴⁴ Prepetition interest on taxes secured by a lien would augment the secured claim.¹⁴⁵

If an agreement creating a security interest provides for attorneys' fees as a flat percentage of the principal indebtedness or as a percentage of some other fixed amount, the indebtedness includes only that portion of fees attributable to any actual and necessary work performed by the attorney.¹⁴⁶ The fact that the provision for a fixed percentage rate for attorneys' fees may be completely allowable under state law is not binding on the bankruptcy court.¹⁴⁷

Of relevant concern is the pertinent date as to which the various components of the indebtedness are computed. The sounder view holds that the proper time to compute these components is when the hearing on relief from the stay is held.¹⁴⁸

¶14.412 Equity and Equity Cushion

The equity of the collateral is the value of the property less the aggregate sum of *all* valid encumbrances on the property held by all creditors.¹⁴⁹ If the encumbrances exceed the value of the property, there is no equity in it. "[T]he 'equity cushion' has been defined as value in the property, above the amount owed to the [movant] with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during [the] time the automatic stay remains in effect."¹⁵⁰ If the property is encumbered by liens or mortgages inferior to those of the movant, those secured interests are disregarded when calculating the equity cushion that protects the movant.¹⁵¹ Superior encumbrances will decrease the movant's equity cushion.

¹⁴⁴ *In Re Venable*, 48 Bankr. 853, (Bankr. S.D.N.Y. 1985).

¹⁴⁵ *Kertennis*, 40 Bankr. at 898.

¹⁴⁶ *First Eastern Bank v. Llewellyn* (*In Re Llewellyn*), 27 Bankr. 481, 482-83 (Bankr. M.D. Pa. 1983); *In Re Baker*, 49 Bankr. 240, 242-43 (Bankr. E.D. Pa. 1985); *Federal National Mortgage Assoc. v. Cosby* (*In Re Cosby*), 22 Bankr. 682 (Bankr. E.D. Pa. 1982).

¹⁴⁷ *Llewellyn*, 27 Bankr. at 482-83.

¹⁴⁸ *Kertennis*, 40 Bankr. 898; *Imperial Bank v. El Patio, Ltd.* (*In Re El Patio, Ltd.*), 6 Bankr. 518 (Bankr. C.D. Cal. 1980); *contra* *La Jolla Mortgage Fund v. Rancho El Cajon Assoc.*, 18 Bankr. 283, 287 (Bankr. S.D. Cal. 1982) (holding that petition date is the proper date).

¹⁴⁹ *Stewart v. Gurley*, 745 F.2d 1194 (9th Cir. 1984); *Nazareth National Bank v. Trina-Dee, Inc.*, 731 F.2d 170, 171 (3d Cir. 1984).

¹⁵⁰ *Pistole v. Mellor* (*In Re Mellor*), 734 F.2d 1396, 1400 n.2 (9th Cir. 1984); *In Re Kertennis*, 40 Bankr. 895, 898 (Bankr. D. R.I. 1984); *La Jolla Mortgage Fund v. Rancho El Cajon Assoc.*, 18 Bankr. 283, 287 (Bankr. S.D. Cal. 1982); *Commonwealth of Pa. State Employees' Retirement Fund v. Roane* (*In Re Roane*), 8 Bankr. 997, 1000 (Bankr. E.D. Pa. 1981), *aff'd* 14 Bankr. 542 (E.D. Pa. 1981).

¹⁵¹ *Pistole*, 734 F.2d 1396; *In Re Woodbranch Energy Plaza One, Ltd.*, 44 Bankr. 733, 736 (Bankr. S.D. Tex. 1984).

¶14.413 *Value of Collateral*

The value of the collateral is, of course, what it is worth. The simplicity of this definition is complicated by the fact that on the hearing on the motion for relief from the automatic stay, the bankruptcy court is free to choose the standard of valuation to be used in fixing the value of the property. The standard may be fair market value, going concern value, distress sale or liquidation value, etc.¹⁵²

¶14.414 *Adequate Protection*

Some insight into the definition of adequate protection of an interest is afforded by 11 U.S.C. § 361:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result by such entity of the indubitable equivalent of such entity's interest in such property.¹⁵³

It provides three nonexhaustive examples of such protection: (1) the debtor's disbursement of a cash payment or periodic cash payments to the secured party to the extent that the stay results in a decrease in value of the secured party's interest in the collateral; (2) the debtor's providing of an additional or replacement lien to the extent that the stay results in a decrease in the value of the secured party's interest in the collateral; (3) and the debtor's granting such other relief as will result in the realization by the secured creditor of the indubitable equivalent of such entity's interest in the collateral.

Adequate protection in collateral should not be determined solely by reference to the lack of an equity cushion but also by the "stability of [the]

¹⁵² American Bank and Trust Co. v. Ram Mfg. Inc., (*In Re Ram Mfg., Inc.*), 32 Bankr. 969 (Bankr. E.D. Pa. 1983).

¹⁵³ Section 506(b).

collateral . . . likelihood of reorganization and . . . credibility of [the] debtor's protection plan."¹⁵⁴

Where adequate protection has been offered to a secured creditor and that protection later proves inadequate, the creditor is entitled to a superpriority administrative expense to the extent of the insufficiency.¹⁵⁵ The insufficiency is gauged, through hindsight, by equitable considerations.¹⁵⁶

The debtor's payment of rent on a leasehold, plus a security deposit, may constitute adequate protection of the lessor's interest in the leasehold.¹⁵⁷

At least one case, *Big Bear Super Market No. 3 v. Princess Baking Corp.*,¹⁵⁸ has held that a creditor with a right of setoff is entitled to adequate protection of that right and in the absence of such protection the stay was modified. This author believes that a result contradictory to *Princess* would also be a rational alternative in deciding the matter.

¶14.420 The Merits of Obtaining Relief Under Subsection 362(d)(1)

¶14.421 Lack of Adequate Protection Under Subsection 362(d)(1)

The most common type of request for relief from the automatic stay is brought by a mortgagee seeking to foreclose on the encumbered collateral which is property of the bankruptcy estate. Under appropriate facts relief may be granted under either § 362(d)(1) or (d)(2). As stated above, relief under § 362(d)(1) may be granted "for cause, including the lack of adequate protection of an interest in property" of the party moving for relief. Note that lack of adequate protection is merely one basis for cause under § 362(d)(5) and that other "causes" may be successfully advanced.¹⁵⁹

Relief from the stay due to a lack of adequate protection may be granted only if the movant has an "interest in property" and that interest is not being "adequate[ly] protect[ed]." Approaching the first prong of this test, it appears that an "interest in property" described in § 362(d)(1) is the same type of property interest that is protected by the Fifth Amendment of the United States Constitution.¹⁶⁰ It is clear that the interest of

¹⁵⁴ *In Re W.S. Shepley & Co.*, 45 Bankr. 473, 480 (Bankr. N.D. Iowa 1984); *Philadelphia Consumer Discount Co. v. Commercial Credit Business Loans, Inc.* (*In Re Philadelphia Consumer Discount Co.*), 37 Bankr. 946 (E.D. Pa. 1984).

¹⁵⁵ 11 U.S.C. § 507(b); *In Re Mutschler*, 45 Bankr. 494, 496 (Bankr. N. Dak. 1984); *In Re Callister*, 15 Bankr. 521, 525-30 (Bankr. D. Utah 1981).

¹⁵⁶ *Mutschler*, 45 Bankr. at 497.

¹⁵⁷ *City Stores Co. v. A.L.S., Inc.* (*In Re A.L.S., Inc.*), 3 Bankr. 107 (Bankr. E.D. Pa. 1980).

¹⁵⁸ *Big Bear Super Market No. 3 v. Princess Baking Corp.* (*In Re Princess Banking Corp.*), 5 Bankr. 587 (Bankr. S.D. Cal. 1980).

¹⁵⁹ See *infra* text accompanying notes 173-190.

¹⁶⁰ S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5835.

a lienor or co-owner in property is the type of interest needing protection.¹⁶¹ Lessors and bailors would typically have interests in property requiring adequate protection. As is similarly apparent, creditors holding nothing more than an unsecured obligation against the debtor are not holding an interest in property within the meaning of § 362(d)(1).¹⁶² More unusual types of interests in property may be subject to a need for different degrees of adequate protection.¹⁶³

Under the second prong of the test, the interest in property addressed in § 362(d)(1) must be protected against erosion in value which cannot be mitigated by the creditor due to his inability to act in the face of the automatic stay.¹⁶⁴ Thus, the creditor is entitled to the *value* of his bargain and should receive the same measure of protection afforded prior to the filing of the bankruptcy petition although he may not get the same *type* of protection he had previously received. Voiced another way the question is, "What must the debtor adequately protect?" The Court of Appeals for the Ninth Circuit in *Crocker National Bank v. American Mariner Ind., Inc.*,¹⁶⁵ answered that the debtor must adequately protect "the present value of the secured creditor's interest" in the collateral.¹⁶⁶ What the courts apparently rejected were findings by the bankruptcy courts of adequate protection even though the secured creditor was undersecured and receiving no periodic payments, while the value of the collateral was static or depreciating. In such a situation the secured creditor was not accruing interest on his secured claim and that failure was apparently the basis for finding a lack of adequate protection. The courts in *American Mariner* and *Tandem Mining* rejected another line of authority which extended "adequate protection to the value of the collateral alone."¹⁶⁷ At least with regard to secured claims which are undersecured, there is no equity cushion to afford adequate protection, and thus the debtor must provide some other means of protection, such as through periodic payments of interest to the creditor on the portion of the claim which is secured. As stated above, *American Mariner* and *Tandem*

¹⁶¹ *Id.*

¹⁶² *In Re Garland Corp.*, 6 Bankr. 456, 463 (Bankr. D. Mass. 1980); cf. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 588 (1935) ("It is true that the position of a secured creditor who has rights in specific property differs fundamentally from that of an unsecured creditor, who has none.").

¹⁶³ *Bankers Life Ins. Co. of Neb. v. Alyucan Interstate Corp. (In Re Alyucan Interstate Corp.)*, 12 Bankr. 803 (Bankr. D. Utah 1981).

¹⁶⁴ *Alyucan*, 12 Bankr. at 808.

¹⁶⁵ *Crocker National Bank v. American Mariner Ind., Inc.*, 734 F.2d 426 (9th Cir. 1984).

¹⁶⁶ *American Mariner*, 734 F.2d at 434, 435; *Accord Grundy Nat'l Bank v. Tandem Mining Corp.*, 754 F.2d 1436 (4th Cir. 1985); *Republic Bank of Houston, N.A. v. Bear Creek Mini Storage, Inc. (In Re Bear Creek Mini Storage, Inc.)*, 49 Bankr. 454 (Bankr. S.D. Tex. 1985).

¹⁶⁷ *American Mariner*, 734 F.2d at 434.

Mining rejected a contrary line of authority. That dismissed view is aptly summarized as follows:

[A]dequate protection relates to maintaining the status-quo during the period after the filing of the petition and before confirmation or rejection of the plan. The secured creditor is entitled to protection against any depreciation or diminution in the value of the collateral as it existed and was available to satisfy the debt on the date of the filing of the petition in bankruptcy.¹⁶⁸

Although not expressed in *American Mariner* or *Tandem Mining*, a secured claim which is oversecured would continue to accrue interest, late charges and attorney fees by attribution of those charges to the unencumbered portion of the collateral or to that portion of the collateral encumbered by creditors would hold encumbrances inferior to that of the movant.¹⁶⁹ Although the movant might not be receiving current payments, at least his secured claim would be continually augmented by interest, late charges, etc. Thus, if a secured creditor is oversecured, *American Mariner* and *Tandem Mining* probably should not apply.¹⁷⁰

A § 362(d)(1) mortgagee often urges that the equity cushion in the property does not adequately protect his security interest. If the equity cushion is large enough, this alone may provide adequate protection.¹⁷¹ If the cushion is not large enough or is nonexistent and if appreciation in the value of the property is not exceeding any accretion of debt, interest, late charges and attorneys' fees, then relief from the stay should be granted due to the lack of adequate protection unless the debtor gives the creditor some other form of adequate protection such as a lien on another parcel of realty.¹⁷²

¶14.422 Other Bases "For Cause" Under 11 U.S.C. Subsection 362(d)(1)

"Because there is no clear definition of what constitutes 'cause,' [under § 362(d)(1)] discretionary relief from the stay must be determined on a case by case basis."¹⁷³

The legislative history and the case law state several possible "causes":

Undoubtedly the court will lift the stay for proceedings before specialized or nongovernmental tribunals to allow those proceed-

¹⁶⁸ *U.S. v. Smithfield Estates, Inc.* (In Re Smithfield Estates, Inc.), 48 Bankr. 910, 914 (Bankr. D. R.I. 1985)(cites omitted).

¹⁶⁹ Section 506(b); *Bear Creek*, 49 Bankr. at 456.

¹⁷⁰ *Bear Creek*, 49 Bankr. at 456.

¹⁷¹ *Pistole*, 734 F.2d 1400.

¹⁷² *American Mariner*, 734 F.2d at 430; § 361.

¹⁷³ *MacDonald v. MacDonald*, (In Re MacDonald) 755 F.2d 715, 717 (9th Cir. 1985).

ings to come to a conclusion. Any party desiring to enforce an order in such a proceeding would thereafter have to come before the bankruptcy court to collect assets. Nevertheless, it will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.¹⁷⁴

Other causes might include the lack of any connection with or interference with the pending bankruptcy case. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is protection of the debtor and his estate from his creditors.¹⁷⁵

A divorce or child custody proceeding including the debtor may bear no relation to the bankruptcy case and in those cases the stay should be modified.¹⁷⁶ "It is appropriate for bankruptcy courts to avoid incursions into family law matters 'out of consideration of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.'" ¹⁷⁷ Furthermore, "[b]ankruptcy courts should be reluctant to entertain questions which may be equally well resolved elsewhere."¹⁷⁸ Relief may be granted to allow only a portion of a law suit to proceed, such as discovery, rather than the entire suit, but such relief

¹⁷⁴ H.R. REP. NO. 595, 95th Cong., 1st Sess. 341 (1977), S. REP. NO. 989, 95th Cong., 2nd Sess. 50 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5836, 6297.

¹⁷⁵ S. REP. NO. 989, 95th Cong., 2d Sess. 52 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5838.

¹⁷⁶ H.R. REP. NO. 595, 95th Cong., 1st Sess. 343 (1977), reprinted in, 1978 U.S. Code Cong. & Admin. News 5787, 6300.

¹⁷⁷ *MacDonald* at 716-17 quoting *Beauchamp v. Graham (In Re Graham)*, 14 Bankr. 246, 248 (Bankr. W.D. Ky. 1981). See also *Howard v. Howard (In Re Howard)*, 27 Bankr. 894, 895-96 (Bankr. W.D. Ky. 1983)(bankruptcy court granted relief from the automatic stay to debtor's ex-wife, who had alleged that the property settlement was fraudulently induced); cf. *Schulze v. Schulze*, 15 Bankr. 106, 109 (Bankr. S.D. Ohio 1981)(the court granted the debtor's wife relief from the automatic stay in order to complete state proceedings for divorce, child custody, and property division).

¹⁷⁸ *Uranga v. Geib (In Re Paso Del Norte Oil Co.)*, 755 F.2d 421, 425 (5th Cir. 1985)(quoting *First State Bank & Trust Co. v. Sand Springs State Bank*, 528 F.2d 350, 354 (10th Cir. 1976)); See also *In Re Curtis*, 40 Bankr. 795 (Bankr. D. Utah 1984)(collecting cases on whether the bankruptcy court should grant relief from the stay to allow litigation to proceed in another forum); See also *Holtkamp v. Littlefield (In Re Holtkamp)*, 669 F.2d 505 (7th Cir. 1982)(relief from the stay is properly granted to allow the plaintiff in a personal injury suit to litigate the debtor's liability in state court).

may be denied on the basis that it would hinder the economical administration of the estate.¹⁷⁹

Another basis for granting relief from the stay "for cause" that some courts have recognized under § 362(d)(1), is the failure of the debtor to make the requisite periodic payments as provided under a document creating the security interest in the collateral at issue.¹⁸⁰ Payments which have been missed either prepetition or postpetition are pertinent in deciding whether relief should be granted on this basis, but the postpetition payments are the most relevant. A review by the court of all pertinent factors is necessary in order to determine whether relief should be granted. For instance, if the debtor has purchased and encumbered a parcel of realty three months prior to the filing of the petition, with the debtor missing two prepetition payments and three postpetition payments, the court would be more inclined to grant relief from the stay than if the debtor had missed six monthly postpetition payments after having faithfully paid on the mortgage for the preceeding ten years. The debtor's failure to provide insurance on encumbered property may also provide "cause" under § 362(d)(1).¹⁸¹

The initiation by the debtor of an action, such as a law suit, against which the movant wishes to interpose a counterclaim that would otherwise be barred by § 362(a), may generally be a basis for cause.¹⁸²

The debtor's abuse of the bankruptcy laws may likewise provide cause as may the debtor's misconduct and bad faith.¹⁸³

¹⁷⁹ *In Re Towner Petroleum Co.*, 48 Bankr. 182, 190 (Bankr. W.D. Okla. 1985).

¹⁸⁰ *See Royal Bank, Inc. v. Three Tuns, Inc. (In Re Three Tuns, Inc.)*, 35 Bankr. 110 (Bankr. E.D. Pa. 1983); *Ukrainian Sav. and Loan Assoc. v. Trident Corp.*, 22 Bankr. 491 (E.D. Pa. 1982); *In Re Tainan*, 48 Bankr. 250, 252 (Bankr. E.D. Pa. 1985).

¹⁸¹ *See In Re Heinzeroth*, 40 Bankr. 518, 520 (Bankr. E.D. Pa. 1984); *Loof v. Frankford Trust Co. (In Re Loof)*, 41 Bankr. 855, 856 (Bankr. E.D. Pa. 1984)(lack of insurance on property is a lack of adequate protection in a takeover proceeding).

¹⁸² *See Bohack Corp. v. Borden, Inc. (In Re Bohack Corp.)* 599 F.2d 1160, 1168 (2d Cir. 1979)(decided under the Bankruptcy Act of 1898).

¹⁸³ *See In Re Augustus Court Assoc.*, 43 Bankr. 352, 354 (Bankr. E.D. Pa. 1984); *In Re Victory Constr. Co.*, 9 Bankr. 549, 560 (Bankr. C.D. Cal. 1981)(by Ordin, B.J.)(exhaustive discussion of lack of "good faith," as well as a collection of grounds "for cause" in granting relief from the stay under the Bankruptcy Act of 1898) (vacated as moot, *see Hadley v. Victory Constr. Co., (In Re Victory Constr. Co.)*, 37 Bankr. 222 (Bankr. 9th Cir. 1984). *See also Fazio v. Alan Sinton, Ltd. (In Re Fazio)*, 41 Bankr. 865, 867 (Bankr. E.D. Pa. 1984)(misconduct and bad faith). *See also California Mortgage Serv. v. Yukon Enters., Inc. (In Re Yukon Enters., Inc.)*, 39 Bankr. 919, 921-22 (Bankr. C.D. Cal. 1984)(debtor's bad faith in filing under the Bankruptcy Code was a basis for finding "cause" under 11 U.S.C. § 362(d)(1) 1982). *See also Assoc. Commercial Corp. v. G. Y. Trucking, Inc. (In Re G. Y. Trucking Inc.)*, 28 Bankr. 59, 61 (Bankr. M.D. Pa. 1982)(lack of good faith due to debtor's failure to allow secured creditor to inspect collateral).

Shuffling of assets from one legal entity to another immediately prior to the filing of a petition under the Bankruptcy Code may constitute bad faith and will be "cause" under § 362(d)(1) in some cases.¹⁸⁴

When the movant wishes to setoff its mutual obligations with the debtor, the mere existence of those mutual obligations represents a prima facie case for cause for relief from the automatic stay in a Chapter 7 case.¹⁸⁵ In a Chapter 11 case this prima facie basis for relief is not present since many other factors must be considered such as the debtor's need for payment on the creditor's obligation to fund the debtor's operations.¹⁸⁶ One court has held that a creditor with a right of setoff is entitled to adequate protection of that right and, in the absence of such protection, the stay should be modified.¹⁸⁷

A prepetition lapse of a lease of the debtor/lessee is sufficient "cause" under §362(d)(1) to modify the automatic stay apparently due to a lack of adequate protection.¹⁸⁸

The mere filing of a petition under the Bankruptcy Code is not cause under § 362(d)(1) notwithstanding the fact that such an event is a breach of a contract.¹⁸⁹

Relief from the stay on request of a secured party cannot be based on the fact that the discharge will extinguish the debtor's *in personam* liability on the debt.¹⁹⁰

¶14.430 Relief Under Subsection 362(d)(2)

¶14.431 Subsection 362(d)(2) Generally

A secured creditor seeking to foreclose may also successfully seek relief from the stay under § 362(d)(2) if he can prove that there is no equity in the property, and that the property is not necessary for an effective

¹⁸⁴ See *California Mortgage Serv. v. Yukon Enters., Inc. (In Re Yukon Enters., Inc.)* 39 Bankr. 919 (Bankr. C.D. Cal. 1984)(transfer of assets to a new corporation which decreased the debtor's chances of reorganization was basis for relief under 11 U.S.C. § 362(d)(1). See also *Myers v. The Beach Club (In Re The Beach Club)*, 22 Bankr. 597 (Bankr. N.D. Cal. 1982)(filing of a petition by a newly formed limited partnership does not constitute bad faith in light of legitimate business reasons and lack of injury to moving creditor).

¹⁸⁵ See *In Re Flanagan Bros.*, 47 Bankr. 299, 303 (Bankr. D. N.J. 1985); *Waste Management v. Barry Parker's, Inc. (In Re Barry Parker's, Inc.)* 33 Bankr. 115 (M.D. Tenn. 1983). See also *In Re Sound Emporium, Inc.*, 48 Bankr. 1 (Bankr. W.D. Tex. 1984)(set-off subordinated U.S. tax debt against a claim the debtor owed to the U.S. army was a sufficient basis for granting relief from the stay to allow set-off in a Chapter 7 case).

¹⁸⁶ *Flanagan Bros., Inc.* at 303 n.9.

¹⁸⁷ *Big Bear Super Market No. 3 v. Princess Baking Corp. (In Re Princess Banking Corp.)*, 5 Bankr. 587, 590 (Bankr. S.D. Cal. 1980).

¹⁸⁸ *In Re 163rd Street Medical Corp.*, 47 Bankr. 869, 871 (Bankr. S.D. Fla. 1985).

¹⁸⁹ *Riggs Natl. Bank v. Perry (In Re Perry)*, 729 F.2d 982, 984-85 (4th Cir. 1984).

¹⁹⁰ See *General Motors Acceptance Corp. v. Sawyer (In Re Sawyer)*, 18 Bankr. 661 (Bankr. D. Idaho 1982); *General Motors Acceptance Corp. v. Abel (In Re Abel)*, 17 Bankr. 424, 426 (D. Mary. 1981).

reorganization. Under Chapter 7 there is no reorganization intended, and thus the creditor need only prove that there is no equity in the property. Under Chapter 11 both elements under § 362(d)(2) must be proved.

¶14.432 *Applicability of Subsection 362(d)(2)(B) in Chapter 13*

Under Chapter 13 there is a split of authority as to whether a movant must prove whether § 362(d)(2) is applicable under that chapter, and, if so, whether the presence of § 362(d)(2)(B) must be proved or whether it is superfluous.¹⁹¹ This author believes the sounder view is that § 362(d)(2) applies in Chapter 13, and that after the creditor proves that there is no equity in the property, the debtor bears the burden of proving the property is necessary to an effective reorganization.

¶14.433 *Property Necessary to an Effective Reorganization*

Under § 362(d)(2)(B) proof that the property is necessary to an effective reorganization requires a showing that there is a reasonable possibility of reorganization within a reasonable time.¹⁹² One court has held that the focus should be on whether the property in question can make an "identifiable contribution" to a debtor's reorganization regardless of whether a Chapter 11 "liquidation or rehabilitation" is intended.¹⁹³ Another court has held that the property must be "critical" to the reorganization.¹⁹⁴ At least one other court has stated that, "[p]roperty is necessary for an effective reorganization whenever it is necessary either in the operation of the business or in a plan to further the interests of interests of the estate through rehabilitation or liquidation."¹⁹⁵ The debtor's failure to prove a "reasonable possibility of a reorganization"

¹⁹¹ See, e.g., *Vieland v. First Fed. Sav. Bank (In Re Vieland)*, 41 Bankr. 134, 142 (Bankr. N.D. Ohio 1984)(§ 362(d)(2) is applicable in Chapter 13 and proof on § 362(d)(2)(B) is required by the debtor to thwart relief under § 362(d)(2)); *Dale Funding Corp. v. Garner (In Re Garner)*, 18 Bankr. 369 (S.D.N.Y. 1982)(§ 362(d)(2) applies in Chapter 13); *Roosevelt Sav. Bank v. Branch (In Re Branch)*, 10 Bankr. 227 (Bankr. E.D.N.Y. 1981)(§ 362(d)(2)(B) not applicable in Chapter 13); *First Fed. Sav. of Austin v. Crouse (In Re Crouse)*, 9 Bankr. 400 (Bankr. S.D. Tex. 1981)(§ 362(d)(2) applies in Chapter 13); *Fidelity Bond and Mortgage Co. v. McAloon (In Re McAloon)*, 1 Bankr. 766 (Bankr. E.D. Pa. 1980)(assumed applicability of § 362(d)(2) to Chapter 13); *Citizens and Southern Natl. Bank v. Feimster (In Re Feimster)*, 3 Bankr. 11, 13-14 (Bankr. N.D. Ga. 1979)(11 U.S.C. § 362(d)(2) 1982) not applicable in Chapter 13).

¹⁹² *Terra Mar Dev. Corp. v. Terra Mar Assoc. (In Re Terra Mar Assoc.)*, 3 Bankr. 462 (Bankr. D. Conn. 1980).

¹⁹³ *In Re Greiman*, 45 Bankr. 574, 580 (Bankr. N.D. Iowa 1984).

¹⁹⁴ *In Re Hutton*, 45 Bankr. 558, 561 (Bankr. N.D. 1984); See also *Nazareth National Bank and Trust Co. v. Trina-Dee, Inc. (In Re Trina-Dee, Inc.)* 26 Bankr. 152 (Bankr. E.D. Pa. 1983); *Barclays Bank of New York v. Saypol (In Re Saypol)*, 31 B.R. 796 (Bankr. S.D. N.Y. 1983).

¹⁹⁵ *In Re Keller*, 45 Bankr. 469, 472 (Bankr. N.D. Iowa 1984) (quoting *Empire, Inc. v. Koopmans (In Re Koopmans)*, 22 Bankr. 395, 407 (Bankr. D. Utah 1982)).

cannot be predicated solely on the debtor's failure to file a plan, but such failure coupled with an unreasonable lapse of time would promote a different result.¹⁹⁶ If there can be no effective reorganization, the property is not considered necessary.¹⁹⁷

In the early stages of a Chapter 11 case the court should balance the interests of the secured creditor against the congressional policy favoring reorganization. "The court should be hesitant to find no reasonable possibility of reorganization especially where the debtor has not had sufficient time to formulate a plan."¹⁹⁸

¶14.434 11 U.S.C. §362(d)(2)(B) and Liquidating Plans

The applicability of § 362(d)(2)(B) in conjunction with a liquidating plan of reorganization has presented some confusion. Under the Bankruptcy Code the court may approve a Chapter 11 plan which proposes the liquidation of the debtor's estate rather than its continuation as an on-going concern.¹⁹⁹ Although § 362(d)(2)(B) ostensibly applies to requests for relief from the stay when liquidation of the assets is proposed in the Chapter 11 plan, the court will probably apply this provision somewhat differently when a liquidating plan is intended rather than a reorganization plan. The first of two reasons for this is that granting or denying relief from the stay on the basis of § 362(d)(2)(B) when liquidation is proposed, is largely a question of who gets to sell the collateral, the debtor or the secured creditor. The same result is contemplated. The greater the similarity between the two forms of disposition, the greater the likelihood the court will grant relief from the stay. Second, the legislative policy behind Chapter 11 reorganizations, part of which is reflected in § 362(d)(2)(B), is that reorganization preserves the going-concern value of the business. A liquidating plan typically would not preserve this value, and if not, the court would also be more inclined to grant relief from the stay. Thus, when a liquidating plan is proposed in Chapter 11, § 362(d)(2)(B) affords the debtor the greatest assurance of a denial of a motion for relief from the stay under § 362(d)(2), when the debtor can prove that the foreclosure sale of the collateral by the creditor following relief from the stay would be essentially different from the sale proposed under the plan. The debtor must further prove that the sale under the plan will preserve some going-concern value of the business that would be lost in a foreclosure sale by the creditor.

¹⁹⁶ *In Re Hutton*, 45 Bankr. 558, 561 (Bankr. D. N.D. 1984).

¹⁹⁷ *In Re Woodbranch Energy Plaza One, Ltd.*, 44 Bankr. 733, 737 (Bankr. S.D. Tex. 1984).

¹⁹⁸ *United States v. Hollie (In Re Hollie)*, 42 Bankr. 111, 118 (Bankr. M.D. Ga. 1984); *In Re Heatron, Inc.*, 6 Bankr. 493 (Bankr. W.D. Mo. 1980).

¹⁹⁹ Section 1123(b)(4) (1982).

¶14.435 *Use of 11 U.S.C. §362(d)(2) When the Debtor has no Ownership Interest in the Property*

Under § 362(d)(2) a query is posed as to whether this provision may be used for any stay under § 362(a), "with respect to a stay of an act against property" ²⁰⁰ The question was raised without resolution in dicta on an action for relief from the automatic stay initiated by a lessor of realty. The court stated:

Although a leasehold entails the use of property, § 362(d)(2) was apparently drafted with an eye toward property in which the debtor had some right of ownership, rather than a mere right of use, as evinced by the term "equity" in that provision. The notion of an equity interest in the typical leasehold is at odds with our understanding of the term. If our perception is correct, either § 362(d)(2) cannot be used by a landlord to retake his leasehold or the provision is applicable in such a situation with proof necessary only on element § 362(d)(2)(B) since § 362(d)(2)(A) would necessarily be met. ²⁰¹

¶14.500 *Burden of Proof*

Section 362(g) states as follows:

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay or any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues. ²⁰²

Under § 362(g) the party requesting relief from the automatic stay has the burden of proof on the issue of the debtor's equity in the property. ²⁰³ To establish the equity the creditor must introduce proof on the value of the property at issue as well as the amount of all encumbrances on it. The party opposing relief from the stay has the burden of proof of all other issues other than the equity in the property. ²⁰⁴ The burden of proof under § 362(d)(1) is allocated by § 362(g)(2) on the debtor, but that burden is at odds with the statement under § 362(d)(1) that the court may grant relief from the stay "for cause." Section § 362(g)(2) ostensibly imposes on the

²⁰⁰ Section 362(d)(2).

²⁰¹ *Roslyn Savings Bank v. Comcoach Corp. (In Re Comcoach Corp.)*, 19 Bankr. 231, 233 (Bankr. S.D.N.Y. 1982). See also *In Re Law Clinic of Mott & Gray, P.C.*, 39 Bankr. 73 (Bankr. E.D. Pa. 1984).

²⁰² Section 362(g).

²⁰³ Section 362(g)(1).

²⁰⁴ Section 362(g)(2).

debtor the burden of establishing that "cause" does not exist for granting relief from the stay without first imposing on the moving creditor the duty of showing that cause is present. This anomaly has been highlighted by a few cases. See, e.g., *Clark Equipment Credit Co. v. Kane* (In Re Kane).²⁰⁵ In *Kane* the court held that a party requesting relief under § 362(d)(1) bears the burden of establishing "cause" for that relief and stated that:

[S]ection [§ 362(d)(1)] imposes the substantive requirement of 'cause' on a party who seeks relief from the stay. In our system of law the party requesting relief from a court typically bears the burden of meeting such substantive prerequisites to relief. *Arthur v. Unkart*, 96 U.S. 118, 122 (1877). . . . To the extent that the cause requirement of § 362(d)(1) may be at odds with the allocation of the burden of proof of § 362(g), we believe that the substantive requirement of § 362(d)(1) controls.²⁰⁶

Although this author believes that the view espoused in *Kane* is the better reasoned position, most courts apparently have not been confronted with the discussed anomaly, and apply the burden of proof as allocated by § 362(g). In practice this theoretical schism typically seems to have little bearing on the outcome of most motions for relief from the stay.

¶14.600 *Relief from the Stay when the Estate*

Consists of a Single Asset of Realty

When the estate consists of merely one parcel of realty the basis for relief from the stay may be granted under § 362(d)(1) or (d)(2) in the same manner that relief could be sought in a multiple asset case. The reason for emphasizing this "non-statement" is that the legislative history of the Bankruptcy Code reflects provisions of an unenacted bill which would have treated such single asset cases differently. The history states in pertinent part as follows:

Upon the court's finding that the debtor has no equity in the property subject to the stay and that the property is not necessary to an effective reorganization of the debtor, [§ 362(d)(2)] requires

²⁰⁵ See, e.g., *In Re Towner Petroleum Co.*, 48 Bankr. 182, 191 (Bankr. W.D. Okla. 1985); *First Agricultural Bank v. Jug End in the Berkshires* (In Re Jug End in the Berkshires), 46 Bankr. 892, 900 (Bankr. D. Mass. 1985); *In Re Borchers*, 45 Bankr. 69, 72 (Bankr. N.D. Iowa 1984); *In Re Augustus Court Assoc.*, 43 Bankr. 352, 354 (Bankr. E.D. Pa. 1984); *In Re Irving A. Horns Farms, Inc.*, 42 Bankr. 832, 837 (Bankr. N.D. Iowa 1984); *In Re Curtis*, 40 Bankr. 795, 801-03 (Bankr. D. Utah 1984); *Clark Equip. Credit Co. v. Kane* (In Re Kane), 27 Bankr. 902, 903-05 (Bankr. M.D. Pa. 1983); *City Stores Co. v. A.L.S., Inc.* (In Re A.L.S., Inc.), 3 Bankr. 107, 108 (Bankr. E.D. Pa. 1980).

²⁰⁶ *Clark Equip. Credit Co. v. Kane*, 27 Bankr. 902, 904 (1983).

[that] the court grant relief from the stay. To aid in this determination, guidelines are established where the property subject to the stay is real property. An exception to "the necessary to an effective reorganization" requirement is made for real property on which no business is being conducted other than operating the real property and activities incident thereto. The intent of this exception is to reach the single-asset apartment type cases which involve primarily tax-shelter investments and for which the bankruptcy laws have provided a too facile method to relay [delay?] conditions²⁰⁷

The proposed statutory language to implement this notion was embraced by S. 2266, 95 Cong., 2d Sess. § 362, 1978 in the following language: "For the purpose of this subsection (d) [proposed § 362(d)], property is not necessary to an effective reorganization of the debtor if it is real property on which no business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto."²⁰⁸ The concept was not ultimately adopted into law. This deviation was implicitly, although correctly, identified in *In Re W.S. Sheppley & Co.*²⁰⁹

¶14.700 *Scope of the Order Granting Relief from the Stay*

The scope of an order granting relief from the stay is determined by the language of the order granting such relief. Nonetheless, orders granting such relief are occasionally ambiguous. Thus, the difficulty in such situations is in establishing the intent of the judge who granted the relief. In the same manner that guidelines have developed around the propriety of granting relief from the stay in certain types of instances, these guidelines are aids in interpreting the scope of the order granting relief from the stay.

Since the automatic stay is one of the primary benefits of filing a petition in bankruptcy, and one in which Congress has broadly favored the debtor, policy dictates that a modification of the stay should not be any broader than necessary to relief the creditor seeking that relief from the hardship he suffers because of the stay. Thus, as a principle in interpreting the scope of an order granting relief from the stay, this author believes that such orders are typically granted in favor of the movants seeking that relief, and are limited to a *particular* course of

²⁰⁷ S. REP. NO. 989, 95th Cong., 2d Sess. 52-53 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5838-839.

²⁰⁸ S. 2266, 95th Cong., 2d Sess. § 362 (1978).

²⁰⁹ See *In Re W.S. Sheppley & Co.*, 45 Bankr. 473, 480 (Bankr. N.D. Iowa 1984). *Contra*, *Riggs Natl. Bank of Washington, D.C. v. Perry*, 729 F.2d 982 (4th Cir. 1984)(dicta implicitly adopting unenacted provision of law).

conduct sought by those movants. Consequently, a court may grant a motion for relief filed by a superior encumbrance holder so he may foreclose on the subject property, but such an order would typically not terminate the stay as to all entities. A "portion" of that stay would still remain extant and protect the property from the advances of other creditors.²¹⁰

¶15.000 AUTOMATIC TERMINATION OF ASPECTS OF THE
STAY WITHOUT FILING IN COURT FOR SUCH RELIEF
At § 362(c) the Bankruptcy Code states:

- (c) Except as provided in subsections (d), (e), and (f) of this section—
 - (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and
 - (2) the stay of any other act under subsection (a) of this section continues until the earliest of—
 - (A) the time the case is closed;
 - (B) the time the case is dismissed; or
 - (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, or 13 of this title, the time a discharge is granted or denied.²¹¹

The Bankruptcy Code provides for the automatic termination of the automatic stay under § 362(c). The statute draws a distinction between "an act against property of the estate: and "any other act" stayed by § 362(a).²¹² The stay of an act against property of the estate continues until the property is no longer property of the estate.²¹³ Under this provision, a further distinction must be drawn between property of the estate and property of the debtor. Property of the estate ceases having that character if it is abandoned by the debtor or the trustee, sold, exempted by the debtor, or otherwise administered under the Bankruptcy Code.²¹⁴

The stay of any act other than an act against property of the estate continues until: 1) the case is closed; 2) the case is dismissed; or 3) if the case is a case under Chapter 7 concerning an individual, or a case under Chapter 9, 11 or 13, the time a discharge is granted or denied.²¹⁵

A very common but mistaken view is that the automatic stay ends

²¹⁰ See *In Re Saint Peter's School*, 26 Bankr. 589, 591 (Bankr. S.D.N.Y. 1983)(where a senior encumbrance holder obtained relief from the stay to foreclose on property, a junior lien holder was not thereby also released from the constraints of the stay). See also *Franklin Fed. Sav. & Loan Assoc. v. Ripianzi (In Re Ripianzi)*, 27 Bankr. 15 (Bankr. M.D. Pa. 1982).

²¹¹ Section 362(c).

²¹² Section 362(c); See *In Re Ripianzi* at 16.

²¹³ Section 362(c)(1).

²¹⁴ 11 U.S.C. § 554(d).

²¹⁵ Section 362(c)(2).

automatically on the entry of the debtor's discharge. This perspective fails to account for § 362(c)(1). On the granting or denying of the discharge, the automatic stay is not thereby terminated as to acts against property of the estate.²¹⁶

Futhermore, when property of the estate is abandoned, creditors are not necessarily free to act against that property since some aspects of the stay may still be extant, e.g., if the debtor has an interest in the property, the stay bars acts against that interest. An abandonment of an item of property plus a grant or denial for discharge terminates the stay in all respects as to the property abandoned.²¹⁷

¶16.000 DISMISSAL OF THE BANKRUPTCY CASE TERMINATES THE STAY

The dismissal of a bankruptcy case generally revests the property of the estate in the entity in which such property was vested immediately prior to the commencement of bankruptcy.²¹⁸ Under § 362(c) the automatic stay is viewed as having two aspects: (1) "the stay of an act against property of the estate"; and (2) "the stay of any other act."²¹⁹ Under the first aspect of the stay described in § 362(c)(1), the stay ends when property is no longer property of the estate.²²⁰ Such a result is effected through § 349(b)(3) on dismissal. The second aspect of the stay terminates, *inter alia*, on dismissal according to the terms of 362(c)(2)(B). Thus, the stay is terminated in all respects when a case is dismissed.

¶17.000 TERMINATION OF AN ASPECT OF THE AUTOMATIC STAY AFTER A LAPSE OF TIME FOLLOWING A REQUEST FOR RELIEF FROM THE STAY

The provisions of § 362(e) are as follows:

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or

²¹⁶ Section 362(c)(1)-(2); *See also, In Re Ripianzi* at 15.

²¹⁷ *See Hickman v. First State Bank of Cordele (In Re Motley)*, 10 Bankr. 141 (Bankr. M.D. Ga. 1981); *In Re Cruseturner*, 8 Bankr. 581 (Bankr. D. Utah 1981); *In Re Tumillo*, 14 Bankr. 736 (Bankr. E.D.N.Y. 1981); *Berry v. Dial Consumer Discount Co. (In Re Berry)*, 11 Bankr. 886 (Bankr. W.D. Pa. 1981).

²¹⁸ 11 U.S.C. § 349(b)(3) (1982).

²¹⁹ Section 362(c)(1)-(2), respectively.

²²⁰ Section 362(c)(1).

may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.²²¹

Also relevant is Bankruptcy Rule 4001(b) which states as follows: "(b) Final hearing on Stay. The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing is commenced pursuant to § 362(e)(2) unless within that time the court denies the motion for relief from the stay."²²² Under § 362(e) thirty days after a request is made under § 362(d) for relief from the stay of an act against property of the estate, such stay is terminated with respect to the party requesting the relief, unless the court, after notice and hearing, orders the stay continued pending the conclusion of, or as a result of, a final hearing and determination under § 362(d). The hearing required under § 362(e) may be a preliminary hearing or may be consolidated with the final hearing under § 362(d). The court must continue the stay pending the conclusion of the final hearing under § 362(d) if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the conclusion of the final hearing. If the hearing under § 362(e) is a preliminary hearing, then the final hearing must be commenced not later than thirty days after the conclusion of the preliminary hearing.

Several points are noteworthy under § 362(e). The first is that it only accords termination of the stay as to requests for relief from the stay of acts against property of the estate. As discussed above, § 362(c) illuminates the dichotomy under § 362(a) between acts against property of the estate and all other acts. Thus it appears that the automatic termination provisions of § 362(e) leave intact the stay of all acts other than acts against property of the estate. The stay of acts against the debtor and acts against property of the debtor would remain unaffected.²²³

The time scheme in § 362(e) and Bankruptcy Rule 4001 (b) provides that the stay of an act against property of the estate lapses thirty days after a request for relief from the stay unless the court orders the stay continued after notice and a hearing. Thus, some hearing on the matter, typically a preliminary hearing, must be held within thirty days after the

²²¹ Section 362(c).

²²² BANKR. R. 4001(b).

²²³ Sections 362(a)(1), (2), (5), (6), (8).

filing of the motion.²²⁴ Within thirty days after a preliminary hearing the court must commence the final hearing.²²⁵ Within thirty days after the commencement of such a hearing the stay lapses unless the court makes a final determination to deny the motion.²²⁶ Subject to court approval, the parties may, of course, agree to continue the stay beyond the limits imposed by § 362(e) and Bankruptcy Rule 4001(b). Without agreement by the parties, the maximum allowable time for deciding a question on modifying the stay of an act against property of the estate is ninety days if there is both a preliminary hearing and a final hearing. If both hearings are consolidated, the maximum time, absent the parties' consent, is sixty days. Some courts have held that under 11 U.S.C. § 105(a) the court may extend these time periods.

Numerous courts have held that the bankruptcy court has the power to extend the stay under Bankruptcy Rule 7065 (incorporating by reference Fed. R. Civ. P. 65) or 11 U.S.C. § 105(a) although the stay has lapsed, or will lapse, under § 362(3).²²⁷

¶18.000 EX PARTE RELIEF FROM THE STAY

Ex parte relief from the stay may be granted under § 362(f) which states:

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.²²⁸

Also relevant is Bankruptcy Rule 4001(c):

(c) Ex Parte Relief From the Stay. Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (1) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or his attorney can be heard in opposition, and (2) the movant's attorney certified to the court in writing the efforts, if any, which

²²⁴ Section 362(e).

²²⁵ Section 362(e).

²²⁶ BANKR. R. 4001(b).

²²⁷ See *Explorer Drilling Co., Inc. v. Martin Exploration Co. (In Re Martin Exploration Co.)*, 731 F.2d 1210, 1214 (5th Cir. 1984); *Navajo Tribe v. Sandmar Corp. (In Re Sandmar Corp.)*, 16 Bankr. 120, 122 (Bankr. D. N.M. 181); *Citizens and S. Natl. Bank v. Feimster (In Re Feimster)*, 3 Bankr. 11, 13 (Bankr. N.D. Ga. 1979). *Contra*, *Jones v. Wood (In Re Wood)*, 33 Bankr. 320 (Bankr. D. Idaho 1983) (the court may not use 105(a) to reinstitute the stay after it lapses under § 362(e) or use § 105(a) to preclude such a lapse).

²²⁸ Section 362(f).

have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subsection and § 362(f) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such person or persons a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.²²⁹

¶19.000 STIPULATION GRANTING RELIEF FROM THE AUTOMATIC STAY

The parties may stipulate to the granting of relief from the automatic stay. Court approval of the stipulation is necessary as it is generally required for all stipulations effecting a final settlement or compromise of a dispute.²³⁰ Such approval is granted on motion.²³¹ Prior to the granting of such relief, twenty days notice of the proposed compromise or settlement must be disseminated to the trustee, all creditors, all indenture trustees and committees in accordance with Bankruptcy Rule 2002(a)(3) unless the court for cause shown directs that notice not be sent.²³² The court may order that the notice of the proposed settlement only be sent to the committees or their authorized agents and all parties who have previously requested copies of all notices.²³³ When the court has approved such a stipulation, the terms of that stipulation will be strictly enforced in the event of default, and the court should not use its equity powers to disregard that agreement.²³⁴

In stipulating to a resolution of a dispute on stay litigation, the movant often incorporates by reference in the document a debt repayment schedule. The movant consents to forego his state debt collection remedies so long as the debtor meets the payment schedule, but on the event of default the agreement may provide that the stay is automatically terminated without further action by the court. Alternatively, the agreement could provide that the stay is modified immediately on

²²⁹ BANKR. R. 4001(c). See also, *Gen. Elec. Credit Corp. v. Montgomery Mall Ltd. Partnership* (*In Re Montgomery Mall Ltd. Partnership*), 704 F.2d 1173 (10 Cir.) (relief under § 362(f) properly granted where the secured creditor "asserted that irreparable injury would ensue unless expenses of the [debtor] were met and unless structural repairs [to improvements to the realty] were undertaken").

²³⁰ BANKR. R. 9019.

²³¹ *Id.*

²³² BANKR. R. 2002(a)(3).

²³³ BANKR. R. 2002(i).

²³⁴ *In Re Borchardt*, 47 Bankr. 879, 881 (Bankr. D. Minn. 1985).

approval of the document by the judge, but that the creditor would not utilize state collection remedies until the debtor's default in repayment. Either of these methods obviates the need to return to court to obtain relief from the stay on the debtor's default, and circumvents the concomitant delay of such recourse.

An oral stipulation made in open court is just as binding as one reduced to writing.²³⁵

A stipulation settling a request for relief from the automatic stay resolves the question of adequate protection even though the creditor may have agreed to receive less protection than the law might otherwise afford.²³⁶

V. MISCELLANEOUS POINTS

¶20.000 INJUNCTIVE ACTION TO THWART THE BANKRUPTCY COURT'S AUTHORITY TO DECIDE QUESTIONS ON RELIEF FROM THE STAY

As stated previously in this work, the bankruptcy court where the bankruptcy petition is pending is generally the authority from which to seek relief from the automatic stay.²³⁷ The only possible alternative is the district court for the district in which the petition is pending, *if* the reference of that aspect of the case has been withdrawn to that district court.²³⁸

In light of these constraints, it appears that a federal district court, and similarly a state court, cannot enjoin a debtor from seeking a determination of the automatic stay from the bankruptcy court where his petition is pending.²³⁹

¶21.000 PROPERTY RELEASED FROM THE STAY IS STILL PROPERTY OF THE ESTATE

When relief from the automatic stay is granted to a creditor as to an item of property of the estate, that property is still property of the estate, and the automatic stay continues to bar other creditors that are enjoined

²³⁵ *Collateral Funding, Inc. v. Herrera (In Re Herrera)*, 23 Bankr. 796, 797 (Bankr. 9th Cir. 1982).

²³⁶ *Yamaha Motor Corp. v. Shadco, Inc.* 762 F.2d 668, 671 (8th Cir. 1985).

²³⁷ See *Erti v. Paine Webber (In Re Baldwin-United Litigation)*, 765 F.2d 343 (2d Cir. 1985); *Cathey v. Johns-Manville Sales Corp.*, 712 F.2d 60 (6th Cir. 1983).

²³⁸ *Id.*

²³⁹ See *Erti* at 343 (Where the debtor was a third party defendant in federal court in New York although his reorganization case was pending in bankruptcy court in Ohio, the district court in New York had the authority to determine whether the stay applied to the litigation before it, but that court erred in granting the third party plaintiff an injunction barring the debtor from seeking in bankruptcy court a declaration that a continuatin of the adversary action was a violation of the automatic stay.)

under § 362(a) from taking action against the property.²⁴⁰ Thus, if a senior encumbrance holder gets relief from the stay to foreclose his security interest, a junior encumbrance holder in that same property is not thereby freed from the prohibitions of § 362(a).²⁴¹

¶22.000 COUNTERCLAIMS GENERALLY NOT HEARD WITH REQUEST FOR RELIEF
FROM THE AUTOMATIC STAY

A hearing on a request for relief from the automatic stay is normally not the proper forum for hearing counterclaims.²⁴² Such a hearing is intended to be a summary proceeding set for expedited disposition; the counterclaims should generally be heard later so as not to delay and burden the disposition of the request for relief from the stay.²⁴³ Nonetheless, the court in its discretion may hear evidence on the existence of counterclaims which it may consider in ruling on the request for relief from the stay.²⁴⁴ Only those counterclaims which go to the essence of the creditor's request for relief from the stay should be heard.²⁴⁵ The question of counterclaims most often arises in cases in which a secured creditor requests a modification of the stay in order to commence or continue foreclosure proceedings against the collateral. Although the creditor, in order to prevail, would typically need to establish the size of his debt; a debt which might ultimately be reduced by setoff if the debtor is successful on his counterclaim; that type of counterclaim generally would not go to the essence of the request for relief.²⁴⁶ But if the debtor challenged the validity of the recordation of the security interest, such a matter would likely run to the essence of the creditor's case. A debtor's counterclaims for the avoidance of liens, such as under § 522(f), would likewise go to the essence of a request for relief from the automatic stay, and thus those counterclaims could be heard with the request for relief from the stay.²⁴⁷ The following is an apt summary:

²⁴⁰ See *In Re Saint Peter's School* at 589 (Bankr. S.D.N.Y. 1983)(after a senior encumbrance holder obtained relief from the stay and sold the subject property, the excess proceeds of the sale were returned to the estate; a junior encumbrance holder could not obtain the proceeds without relief from the stay nor could the debtor use the property without court approval since it was cash collateral).

²⁴¹ *Id.*

²⁴² S. REP. NO. 989, 95th Cong., 2d Sess. 55 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5841.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ See *Cent. Penn Natl. Bank v. Zimmerman (In Re Ludwig Honold Mfg. Co.)*, 35 Bankr. 703, 705 (Bankr. E.D. Pa. 1984); *In Re Sunshine Books, Ltd.*, 41 Bankr. 712, 715 n.2 (Bankr. E.D. Pa. 1984); *Maryland Natl. Indus. Fin. Corp. v. Vacuum Cleaner Corp. of Am. (In Re Vacuum Cleaner Corp. of Am.)*, 33 Bankr. 701, 705-06 (Bankr. E.D. Pa. 1983).

²⁴⁶ *In re Vacuum Cleaner* 33 Bankr. at 705.

²⁴⁷ *Id.*

Although defenses or counterclaims may be related or, to an extent, be plausibly relevant to any determination of the amount of the debt due if they are based upon allegations such as misapplication or wrongful receipt of funds, breach of contract or various miscellaneous alleged contractual duties, or fraud or false representations, they are related or relevant only in the sense that, if successfully maintained, they would ultimately effectuate a reduction or set-off in the overall debt-credit relationship between the parties. These types of matters and claims really do not go to the validity and amount of the specific debt or lien itself.²⁴⁸

¶23.000 CONFIRMATION BARRING RELIEF FROM THE STAY

As outlined above, the aspect of the stay afforded by § 362(a) which bars acts against property of the estate terminates when the property is no longer property of the estate.²⁴⁹ The remaining aspects of the stay terminate at the earliest on the time of the closing of the case, the dismissal of the case, or at the time of granting or denial of a discharge.²⁵⁰ As to the first prong of § 362(c), title to property reverts in the debtor on the confirmation of a Chapter 11 or 13 plan unless the plan or the order confirming the plan provides otherwise.²⁵¹ Thus, the prohibition of acts against property of the estate as provided by § 362(a) would end on confirmation if the property in question vested in the debtor, but this aspect of the stay would still apply if the property did not so vest.²⁵² In spite of this, §§ 1141(a) and 1327(a) provide that in Chapter 11 and 13 the confirmed plan binds the debtor and all creditors.

Furthermore, in a Chapter 11 case a discharge of debts is effected immediately on the entry of the order of confirmation, such entry typically being made prior to the debtor's full compliance with the plan although in a chapter 13 case the discharge is entered only when all plan payments have been made.²⁵³ Thus, under chapter 11, the stay under § 362(a) of all acts other than acts against property of the estate would terminate on confirmation.²⁵⁴

²⁴⁸ *Maryland Nat'l Indus. Fin. Corp. v. Vacuum Cleaner Corp.*, 33 Bankr. 701, 705 (1983)(quoting *United Companies Fin. Corp. v. Brantley*, 6 Bankr. 178, 185 (Bankr. N.D. Fla. 1980)).

²⁴⁹ Section 362(c)(1).

²⁵⁰ Section 362(c)(2).

²⁵¹ 11 U.S.C. §§ 1141(b) and 1327(b); see *Mason v. Williams (In Re Mason)*, 45 Bankr. 498 (Bankr. D. Ore. 1984)(Chapter 13) *aff'd*, 51 Bankr. 548 (1985); *In Re Lewis*, 33 Bankr. 98 (Bankr. W.D. N.Y. 1983)(Chapter 13); *In Re Paradise Valley Country Club*, 31 Bankr. 613 (D. Colo. 1983) *aff'g* 26 Bankr. 990 (1983) (construing 11 U.S.C. § 1141(b), which is the Chapter 11 analogue of § 1327(b)).

²⁵² Section 362(c)(1).

²⁵³ Sections 1141(a)(d)(1) and 1328(a).

²⁵⁴ Section 362(c).

Consequently, the confirmation of a Chapter 11 plan typically terminates all aspects of the automatic stay.²⁵⁵ Nonetheless, as stated above, the confirmed plan binds both the debtor and creditors which effectively replaces the protection afforded by the stay.

One line of authority holds that a confirmed plan, whether under Chapter 11 or 13, binds the debtor and creditors and precludes the court from granting relief from the automatic stay on grounds which were present prior to the confirmation.²⁵⁶ Another line of authority holds that a default in a confirmed plan releases a creditor from the constraints of the plan, leaving him free to pursue debt collection efforts, including foreclosure on encumbered property.²⁵⁷

¶24.000 FAILURE TO FILE A PROOF OF CLAIM BARRING SECURED CREDITOR
FROM OBTAINING RELIEF FROM THE STAY—AN ABERRANT LINE
OF CASES

A few aberrant cases have held that a secured creditor who fails to file a timely proof of claim is barred from demanding adequate protection or relief from the stay. See, e.g., *Citizens and Southern National Bank v. Reuelta* (*In Re Reuelta*).²⁵⁸ The cases rely on former Bankruptcy Rule 13-302(e)(1) which provided in part that, "[a]ny claim not properly filed by the [secured] creditor [before the conclusion of the first meeting of creditors] shall not be treated as a secured claim for purposes of voting and distribution in the Chapter XIII case."²⁵⁹ The courts construed the phrase "for purposes of voting and distribution" as including a request for relief from the stay.²⁶⁰

The advisory committee notes to current Bankruptcy Rule 3002 indicate that, "[a] secured claim need not be filed or allowed under § 502 or § 506(d) unless a party in interest has requested a determination and allowance or disallowance under § 502."²⁶¹ This change would apparently "overrule" cases such as *Reuelta*.

²⁵⁵ *In Re Ernst*, 45 Bankr. 700 (Bankr. D. Minn. 1985).

²⁵⁶ See *In Re Evans*, 30 Bankr. 530 (Bankr. 9th Cir. 1983) *aff'd*, 22 Bankr. 980 (1982); *Com. of Pa. v. Flick (In Re Flick)*, 14 Bankr. 912 (Bankr. E.D. Pa. 1981); *In Re Clark*, 38 Bankr. 683 (Bankr. E.D. Pa. 1984) (collecting cases); *Rhode Island Cent. Credit Union v. Zimble (In Re Zimble)*, 47 Bankr. 639 (Bankr. D. R.I. 1985).

²⁵⁷ See *In Re Ernst*, 45 Bankr. 700 (Bankr. D. Minn. 1985); *Gen. Motors Acceptance Corp. v. Fortner Oilfield Serv., Inc. (In Re Fortner Oilfield Serv., Inc.)*, 49 Bankr. 9 (Bankr. N.D. Tex. 1984).

²⁵⁸ See, e.g., *Citizens & S. Natl. Bank v. Reuelta (In Re Reuelta)*, 27 Bankr. 137 (Bankr. N.D. Ga. 1983).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

¶25.000 THE FILING OF MULTIPLE PETITIONS TO THWART CREDITOR'S EFFORTS FOR
RELIEF FROM THE STAY

The filing of multiple petitions by debtors has been a continual source of dismay to many creditors who seek relief from the automatic stay. This is not surprising since the automatic stay is one of the primary benefits of filing a petition in bankruptcy, and is frequently the only substantial goal sought by a debtor.

The filing of multiple petitions arise under three different guises. The first is the institution of subsequent bankruptcy proceedings after the previous bankruptcy proceeding has been successfully terminated. In such case under the earlier petition; any available assets have been distributed to creditors through liquidation or under a repayment plan; and a discharge, if allowable, has been granted or denied; and the case closed. The second variant involves the filing of a subsequent petition after the termination and closing of a previously aborted bankruptcy proceeding. The last of the trilogy involves the filing of a later petition during the pendency of proceedings on the former petition.

The question presented on the filing of a subsequent petition is whether the later filing gives rise to the automatic stay. The language of § 362(a) leads to the general proposition that the filing of a subsequent petition gives rise to the stay. By its terms § 362(a) states: "(a) Except as provided in [§ 362(b)], a petition filed under section 301, 302, or 303 of this title . . . operates as a stay. . . ." Thus, our springboard is the principle that a validly filed petition gives rise to the stay.²⁶² By implication, the filing of a petition may not be valid.

Under the first situation, little problem is presented. After the successful termination of one case, it seems that the debtor is free to file another petition. A case is terminated when the clerk's office marks it "closed."²⁶³ The Bankruptcy Code contains no express limitations on the filing of a bankruptcy petition after the successful completion of any earlier proceeding. However, some mistakenly perceive the six year bar to the discharge of debts in 11 U.S.C. § 727(a)(8) and (A)(9) as a bar to the filing of a petition. This is not so. A debtor may file a petition even though he would not be entitled to a discharge.

On the second variety of multiple petitions listed above, the following is a pertinent portion of § 109:

§ 109. Who may be a debtor

* * *

(f) Notwithstanding any other provision of this section, no indi-

²⁶² *In Re Norris*, 39 Bankr. 85, 87 (E.D. Pa. 1984).

²⁶³ BANKR. R. 5009.

vidual may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceeding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.²⁶⁴

This subsection was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984. The initial question under this provision is whether the filing of a petition in violation of § 109(f) is void *ab initio* so that the automatic stay is not implemented on the filing of the petition. There is still a dearth of case law as of this writing, but this seems a sounder view. The provision was apparently passed by Congress to reduce debtors' latitude for abusing the bankruptcy statute. As stated above, one of the primary goals of many debtors who file multiple petitions is the protection of the automatic stay. Thus, it seems that this construction is in accord with congressional intent. If this view proves correct, no stay would arise notwithstanding the pendency of the petition, and a creditor would be unconstrained by § 362(a). The conclusion that a petition filed in violation of § 109(f) is void *ab initio* is not the only rational determination a court may make, but this author believes that it is the soundest of several.

An alternative view is that the filing of the petition in violation of § 109(f) nonetheless gives rise to the stay, at least until the bankruptcy judge enters an order to dismiss the case. Such a dismissal would typically be predicated on the filing of a motion for dismissal by the trustee or a creditor. Prior to the entry of the dismissal, the debtor would have obtained, at least in part, his objective of delaying creditors with the automatic stay. This alternative suggests the issue of whether the dismissal order automatically annuls the stay, or whether annulment requires a court order under § 362(d) which expressly allows for such relief. The point is pertinent since, as stated above, actions taken in violation of the stay are void. Thus, for example, if the filing gives rise to the stay and such stay is not annulled, an involuntary transfer of property of the estate during the pendency of the case would be void, and would theoretically cloud title to that property.

The above analysis presupposes that it is apparent that the debtor's filing of a petition breaches § 109(f). An examination of the docket from the prior proceeding(s) would usually reveal whether the debtor has filed

²⁶⁴ Section 109(f)(2).

in disregard of § 109(f)(2). Subsection 109(f)(2) merely requires that the debtor requests and obtain dismissal after a creditor moves for relief from the stay. The temporal sequence alone is pertinent. The language of the statute does not require proof that the debtor intended to circumvent a creditor's request for relief from the stay.

Although the presence of a bar to filing provided by § 109(f)(2) may easily be gleaned from the docket, conclusions under § 109(f)(1) are not always so simply made. Section 109(f)(1) apparently requires an actual finding by the bankruptcy court that the case was dismissed due to the debtor's willful dereliction or his failure to appear before the court in proper prosecution of the case. The problem with § 109(f)(1) is illuminated by a number of situations in which the court dismisses a case "for cause," although the "cause" need not be the debtor's willful failure to abide by orders of the court or to appear before the court in proper prosecution of the case. This dilemma presents a logistical problem for the courts in deciding when the factual determination under § 109(f)(1) should be made: at the termination of the earlier proceeding when that case is dismissed; or at the commencement of the subsequent case on a party's motion for dismissal based on § 109(f)(1). Holding it at the earlier opportunity will be a waste of time if the debtor does not ultimately file another petition within the 180 day period. But, holding the hearing only after the filing of the later petition initially gives the later filing the presumption of propriety, thus apparently giving rise to the automatic stay. This consequently delays creditors' actions against the debtor until a party can obtain a determination that the earlier dismissal was due to the debtor's willful dereliction or lack of prosecution. If the court does not have a set procedure established for when the hearing should be held, it seems possible that a creditor may successfully request a hearing under § 109(f) either at the dismissal of the earlier case or the commencement of the later one.

On the subject of our third variant of multiple filings, the lodging of a second petition during the pendency of the first may be a nullity.²⁶⁵ "Over the years, there has been a truism in bankruptcy circles that a debtor cannot have two cases pending at the same time"²⁶⁶ The Bankruptcy Code provides no express bar to the filing of successive petitions during the administration under the first petition, although the pendency of multiple petitions at the same time seems incongruous with the scheme of the statute.

With a second petition filed during the administration of the first, the

²⁶⁵ *Assoc. Fin. Serv. v. Cowen (In Re Cowen)*, 29 Bankr. 888, 894 (Bankr. S.D. Ohio 1983)(nullity).

²⁶⁶ *In Re Tauscher*, 26 Bankr. 99, 101 (Bankr. E.D. Wis. 1982)(the court ultimately held that the filing of a Chapter 13 petition during the pendency of a Chapter 7 case was allowable under the facts of that case).

question again is whether the second filing gives rise to an automatic stay. The point is pertinent because certain acts may no longer be barred under the stay arising from the first petition—for instance, because the entry of discharge under the first petition would terminate the stay as to all acts other than acts against property of the estate, such acts could be barred under the stay arising on the subsequent filing.²⁶⁷ It is possible that a particular bankruptcy court may adopt as law the notion that the second filing is void *ab initio* with no stay ever having arisen under that spurious filing. This first choice is preferred by this author. The second of several other options is that the court could hold that the filing of the second petition is valid so long as it occurs after some significant cleavage date in the administration of the case under the first petition. At least one court has held that the filing of a second petition is valid so long as it is filed after the entry of discharge under the first petition.²⁶⁸ A third possibility is that the second filing is valid until dismissed by the court. Any acts in derogation of the stay arising from the second petition would be violative of the stay unless the particular creditor obtained an annulment of the stay under § 362(d)(1). The case law has not yet crystallized in this area.

¶26.000 RES JUDICATA ON RELIEF FROM THE AUTOMATIC STAY

The better reasoned view is that the doctrine of *res judicata* does not apply to actions on relief from the stay, although in certain matters the related doctrines of collateral estoppel and law of the case *may* apply.

The effects of *res judicata* on relief from the stay are best analyzed by bifurcating the discussion into its effect within a single bankruptcy case and its effect between different cases. Within a single case the *granting* of relief from the stay would be presumptively determinative for the remainder of the bankruptcy proceeding. If circumstances change to such an extent that in retrospect the granting of relief from the automatic stay appears highly improvident, the debtor could move for reconsideration or relief either under Bankruptcy Rules 9023 and 9024, incorporating by reference Fed. R. Civ. P. 59 and 60, or the doctrine of *Wayne United Gas Co. v. Owens-Illinois Glass Co.*²⁶⁹ and *Pfister v. Northern Illinois Finance Corp.*²⁷⁰ as applied in *In Re Texlon Corp.*²⁷¹ Review of a decision on a request for relief under Fed. R. Civ. P. 60(b) made beyond the ten day appeal period does not subject the underlying judgment to review on appeal of a denial of relief under 60(b).

²⁶⁷ Section 362(c).

²⁶⁸ See *In Re Tauscher*, 26 Bankr. 99 (Bankr. E.D. Wis. 1982).

²⁶⁹ *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131, 137-38 (1937).

²⁷⁰ *Pfister v. N. Illinois Fin. Corp.*, 317 U.S. 144 (1942).

²⁷¹ *In Re Texlon Corp.*, 596 F.2d 1092, 1100-02 (2d Cir. 1979).

A denial of relief from the automatic stay would not bind a movant under the principle of *res judicata*. The doctrine of *res judicata* is customarily predicated on the use of a court hearing to prove that certain historical facts existed which fit the mold of the cause of action at issue. With a traditional cause of action, history has "frozen" the pertinent facts. In an action for relief from the stay many of the pertinent facts remain mutable. For instance, on a mortgagee's motion for relief from the stay, both the value of the subject land and the size of the debt at issue will change with the passage of time. Furthermore, relief from the stay is peculiarly subject to numerous variables and equities in the case that are typically subject to change. These variables include the debtor's potential for reorganization, his continued ability to provide adequate protection, and the arising of other "causes" warranting relief from the stay such as a lapse of insurance coverage on encumbered property even though the "cause" was not previously present. As stated in a recent case:

[T]he denial of relief from the stay is analogous to the continuation of a preliminary injunction, see *Foust v. Munson S.S. Lines*, 299 U.S. 77 (1936), and therefore lacks the requisite finality for a strong preclusive *res judicata* effect. *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953).²⁷²

Contrary authority ostensibly provides that *res judicata* is binding on questions of relief from the stay. See, e.g., *In Re Bystrek*.²⁷³ A closer examination of cases such as *Bystrek* reveals that many of these cases provide other bases for the decisions rather than *res judicata*. For instance, in *Bystrek* the court granted the creditor's motion for relief from the stay during the pendency of the debtor's first petition. After dismissal of that petition the debtor filed another during the pendency of which the creditor obtained a default judgment for relief from the stay. The court denied the debtor's motion for reconsideration of the entry of the default judgment finding that the second petition was filed in bad faith to defraud the secured creditor, and that there were no changes in circumstances underlying the merits of granting the motion for relief from the stay. Furthermore, the continued vitality of *Bystrek* is in question as to the proposition that relief from the stay is *res judicata*.²⁷⁴

The courts deciding cases in this area seem to be in search of an emerging rule that—when a creditor has obtained relief from the stay during the pendency of the first petition, at least in instances where the creditor sought the relief to foreclose a lien—on the dismissal of the first petition and the filing of a second one, the creditor filing for relief from

²⁷² *Johns-Manville Corp. v. Asbestos Litigation Group*, 40 Bankr. 219, 228 (Bankr. S.D.N.Y. 1984). See also, *In Re Artishon*, 39 Bankr. 890 (Bankr. D. Minn. 1984).

²⁷³ *In Re Bystrek*, 17 Bankr. 894 (Bankr. E.D. Pa. 1982).

²⁷⁴ *In Re Norris*, 39 Bankr. 85 (E.D. Pa. 1984).

the stay under the second petition is presumptively entitled to that relief unless the debtor or the trustee rebuts the presumption.²⁷⁵

¶27.000 PENALTIES FOR ABUSIVE FILINGS

The filing of frivolous or multiple petitions, an act often done to implement the automatic stay and delay creditors, subjects the debtor and his counsel to risk. As provided in part by Bankruptcy Rule 9011:

Rule 9011. Signing and Verification of Papers

(a) *Signature.* Every petition, pleading, motion and other paper filed served in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, statement of financial affairs, statement of executory contracts, Chapter 13 Statement, or amendments thereto, shall be signed by at least one attorney of record in his individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state his address and telephone number. The signature of an attorney or a party constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.²⁷⁶

The rule, of course, is a modification of Fed. R. Civ. P. 11. *Inter alia*, the debtor or his counsel is subject to liability under the rule. Under this provision debtors' counsel have been assessed attorneys' fees in favor of opposing counsel for costs incurred by opposing counsel in obtaining relief

²⁷⁵ See, e.g., *Bystrek*, 17 Bankr. 894; *Artishon*, 39 Bankr. 890 (although a secured creditor obtained relief from the stay against the debtor in a prior bankruptcy case, the debtor's changed circumstances precluded a finding of "cause" under § 362(d)(1) in the case under scrutiny).

²⁷⁶ BANKR. R. 9011(a).

from the automatic stay from second and subsequent petitions which have been filed in bad faith.²⁷⁷

Relief for the abusive filing of petitions may also be predicated on 28 U.S.C. § 1927:

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.²⁷⁸

Note that § 1927 generally only applies against attorneys and not litigants.

Litigants may be assessed costs under the court's inherent power to protect the orderly administration of justice, and to maintain the authority and dignity of the court.²⁷⁹ Under the court's inherent power, sanctions may be predicated on conduct which, "constitutes or was tantamount to bad faith," although under § 1927 relief must be predicated on "reckless or actual bad faith conduct."²⁸⁰

Exceptions to the "American Rule" for awarding attorneys' fees may also be a possibility.²⁸¹

¶28.000 ATTORNEYS' FEES FOR PURSUING MODIFICATION OF THE STAY

The following is the "American Rule" for awarding attorneys' fees: "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."²⁸² Furthermore:

Summarizing the law . . . "[i]t is a well-settled general principle that an attorney must look to his own client alone for payment for his services, and this principle is applicable in bankruptcy matters as well as in others. . . ." 6 *Remington on Bankruptcy* ¶2665 (5th ed. 1952). Nonetheless, an attorney may be compen-

²⁷⁷ See *In Re Perez*, 43 Bankr. 530, 534 (Bankr. S.D. Tex. 1984); *In Re Ligon*, 50 Bankr. 127, (Bankr. M.D. Tenn. 1985).

²⁷⁸ 28 U.S.C. § 1927 (1986). See, e.g., *Sundstrom Mortgage Co., Inc. v. 2218 Bluebird Ltd. Partnership* (*In Re 2218 Bluebird Ltd. Partnership*), 41 Bankr. 540, 544 (Bankr. S.D. Cal. 1984)(on assessment against debtor's counsel under § 1927).

²⁷⁹ *In Re Bluebird* at 544.

²⁸⁰ See *Id.*; See also *U.S. v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983).

²⁸¹ See cases collected in *Lycos Truck Sales and Serv., Inc. v. Hopkins* (*In Re Lycos Truck Sales and Service, Inc.*), 20 Bankr. 408 (Bankr. M.D. Pa. 1982).

²⁸² *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *Perichak v. Int'l. Union of Elec. Radio and Mach. Workers*, 715 F.2d 78 (3d Cir. 1983).

sated from the bankruptcy estate where the Code expressly or by clear implication authorizes allowance out of that estate. *Id.* Happily for bankruptcy lawyers the Code expressly allows for the award of attorneys' fee when there is an order appointing them. See e.g., 11 U.S.C. §§ 327, 330, 1103.²⁸³

Exceptions to the American Rule may be found summarized in *Lyco Truck Sales and Service, Inc. v. Hopkins* (In Re Lyco Truck Sales and Service, Inc.).²⁸⁴

In accordance with the "American Rule," a party who moves for relief from the stay is generally not entitled to attorneys' fees from the debtor or the estate. An exception to this rule is expressly provided for a creditor holding a security interest in property of the estate where the agreement creating that security interest provides that the creditor is entitled to attorneys' fees.²⁸⁵ The exception is limited to situations where the equity cushion in the collateral protecting that creditor is adequate to allow the attachment of those fees to the property.

On a related front, one case has held that where the debtors prevailed on a creditor's motion for relief from the stay to foreclose on a deed of trust, the debtors were not entitled to attorneys' fees notwithstanding a clause in the document creating the deed of trust allowing the creditor attorneys' fees as well as California state statute allowing such fees "in an action on a contract" if the contract allows the opposing party attorneys' fees.²⁸⁶ The court stated that "the state law governing contractual relationships is not considered in stay litigation."²⁸⁷ Although the court's apparent basis for the decision—that the contractual relationship is not considered in stay litigation—is arguably erroneous, the result is based on policy considerations, but, of course, it is nonetheless binding under that state statute in that circuit. An identical result based on a construction of the California statute would have provided a more tenable basis for the holding.

¶29.000 INJUNCTIONS UNDER THE BANKRUPTCY CODE OTHER THAN THOSE ARISING UNDER SECTION 362(A)

As discussed above, 11 U.S.C. § 1301 bars actions against those who are liable with the debtor on certain obligations if the debtor is proceeding in a Chapter 13 case.

One of the primary sources of injunctive power under the Bankruptcy Code is found at 11 U.S.C. § 105(a): "(a) The court may issue any order,

²⁸³ *In Re Fidelity Am. Fin. Corp.*, 48 Bankr. 258, 260 (Bankr. E.D. Pa. 1985).

²⁸⁴ See *In Re Lyco* at 408.

²⁸⁵ Section 506(b).

²⁸⁶ *Johnson v. Righetti (In Re Johnson)*, 756 F.2d 738 (9th Cir. 1985).

²⁸⁷ *Id.* at 740.

process, or judgment that is necessary or appropriate to carry out the provisions of this title.”²⁸⁸

The termination or modification of utility service is circumscribed by 11 U.S.C. § 366:

(a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.²⁸⁹

Section 366(a) bars a utility from discriminating against a debtor or the trustee, or altering, refusing, or discontinuing service solely because the debtor filed for bankruptcy or has not paid for prepetition utility service. The utility may modify or terminate service if the debtor or the trustee does not provide a security deposit or other assurance that the debtor will pay for postpetition utility service.²⁹⁰ The United States Court of Appeals for the Third Circuit has held that if the debtor defaults in his postpetition utility payments, the utility may commence termination proceedings under nonbankruptcy law.²⁹¹ Such nonbankruptcy laws, such as the regulations of the Pennsylvania Public Utility Commission, are not preempted by § 366.²⁹²

Under 11 U.S.C. § 524(a)(2) the entry of discharge gives rise to an injunction against all attempts to collect on discharged debts. Section 524(a)(3) similarly provides that, subject to exceptions, the entry of discharge enjoins creditor action on prepetition community claims against the debtor's interest in community property that was acquired after the filing of the bankruptcy petition.

Property exempted by the debtor is protected from creditor action to a limited extent under 11 U.S.C. § 522(c):

²⁸⁸ Section 105(a).

²⁸⁹ Section 366.

²⁹⁰ *Id.*

²⁹¹ *Begley v. Philadelphia Elec. Co.*, 760 F.2d 46 (3d Cir. 1985).

²⁹² *Id.*

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—

(1) a debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title; or

(2) a debt secured by a lien that is—

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed.²⁹³

This section provides that even a nondischargable debt may not be satisfied by exempt property unless the debt is for taxes, alimony, maintenance, or child support or is a debt secured by an unavowed lien.

The Bankruptcy Code likewise enjoins certain kinds of discriminatory treatment:

§ 525. Protection against discriminatory treatment.

(a) Except as provided in the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. §§ 499a - 499s), the Packers and Stockyards Act, 1921 (7 U.S.C. §§ 181 - 229), and section 1 of the Act entitled, "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, (57 Stat. 422; 7 U.S.C. § 204), a government unit may not deny, revoke, suspend, or refuse to renew a licence, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.²⁹⁴

The Bankruptcy Amendments and Federal Judgeship Act of 1984 extended the protection of § 525 with the following language:

²⁹³ Section 522(c).

²⁹⁴ Section 525(a).

(b) No private employer may terminate the employment of, or discriminate with respect to employment, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt—

(1) is or had been a debtor under this title or a debtor under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.²⁹⁵

¶30.000 APPEAL FROM AN ORDER GRANTING OR DENYING RELIEF FROM THE AUTOMATIC STAY

Final orders of the bankruptcy court are appealable to the district court or, if applicable, to the bankruptcy appellate panel.²⁹⁶ An order granting relief from the automatic stay is not final in that it does not end all judicial proceedings as to the bankruptcy under consideration,²⁹⁷ yet the weight of authority holds that the order is sufficiently separate from the bankruptcy so as to afford appeal as a matter of right under exceptions to the finality doctrine.²⁹⁸

In a related area, several defendants in a civil action who unsuccessfully sought a stay of a civil action pending the resolution of the bankruptcy proceedings of several other defendants, could not appeal the denial of the stay as a matter of right.²⁹⁹

¶30.100 *Procedure for Appeal*

The Bankruptcy Rules govern the appellate process from the bankruptcy court to the district court or the bankruptcy appellate panel. As with all other final orders of the bankruptcy court, a notice of appeal must

²⁹⁵ Section 525(b).

²⁹⁶ 28 U.S.C. § 158 (Supp III 1985).

²⁹⁷ Section 362.

²⁹⁸ *Crocker Nat. Bank v. Am. Mariner Inc.*, 734 F.2d 426, 429 (9th Cir. 1984)(order granting or denying relief from the automatic stay is appealable as a matter of right); *Moxley v. Comer*, 716 F.2d 168 (3d Cir. 1983)(same); *Aetna Life Ins. Co. v. Leimer*, 724 F.2d 744 (8th Cir. 1984)(same); *Growth Realty Co. v. Regency Woods Apartments*, 686 F.2d 899, 902 (11th Cir. 1982)(same); *Sec. Investor Protection Corp. v. Christian-Paine & Co., Inc.*, 755 F.2d 359, 360 (3d Cir. 1985)(appellate jurisdiction over interlocutory appeals from bankruptcy courts); *In Re Amatex*, 755 F.2d 1034 (3d Cir. 1985)(finality requirement for appellate jurisdiction is broadly construed).

²⁹⁹ *Evilsizor v. Eagle-Picher Inc.*, 725 F.2d 97 (10th Cir. 1984); *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068 (3d Cir. 1983)(same)(also contains excellent review of interlocutory review, mandamus and prohibition).

be filed with the clerk of the bankruptcy court *within ten days* after the court's order is docketed,³⁰⁰ as opposed to the longer thirty day period that applies in appealing from final orders of the district court.³⁰¹ Within ten days after the entry of the order, a party may move for judgment notwithstanding the verdict, for the amendment or finding of additional facts, alteration or amendment of the judgment, or for a new trial. These motions toll the running of the appeal period.³⁰²

Within ten days after the filing of a notice of appeal the appellant must file with the clerk of the bankruptcy court a designation of the items to be included in the record on appeal, and a statement of the issues to be presented.³⁰³ Within seven days after the service of the appellant's statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal, and if the appellee has filed a cross appeal, the appellee as cross appellant, shall file and serve a statement of the issues to be presented on the cross appeal, as well as a designation of additional items to be included in the record.³⁰⁴ A cross appellee may within seven days of service of the cross appellant's designation, file and serve on the cross appellant a designation of additional items to be included in the record.³⁰⁵ The appellate record shall include the items designated by the parties as well as the notice of appeal, the judgment from which the appeal lies, and any opinion, findings of act, and conclusions of law of the bankruptcy court.³⁰⁶ If the record includes a transcript, the party designating the transcript shall immediately deliver to the report and file with the clerk of the bankruptcy court a written request for it, and make satisfactory arrangements to secure payment of it.³⁰⁷ When the record is complete the clerk of the bankruptcy court transmits it to the clerk of the appropriate appellate court.³⁰⁸

Papers to be filed with the appellate courts shall be filed with the clerk of the appropriate court—either the clerk of the district court or the clerk of the bankruptcy appellate panel—but filing of a paper is not complete until it is *received* by that clerk.³⁰⁹ Nonetheless, briefs are deemed filed on the day of mailing.³¹⁰ Unless local rule of court or court order directs otherwise, the appellant shall file and serve his brief within fifteen days

³⁰⁰ FED. R. APP. P. 4.

³⁰¹ BANKR. R. 8002.

³⁰² BANKR. R. 8002(b).

³⁰³ BANKR. R. 8006.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ BANKR. R. 8007(b).

³⁰⁹ BANKR. R. 8008(a).

³¹⁰ *Id.*

after the entry of the appeal on the appellate court docket.³¹¹ The appellee must serve and file his brief within fifteen days after service of the appellant's brief, and if the appellee has cross appealed, he should therein brief the merits of his cross appeal although the issues and arguments on the appeal, and the cross appeal should be separately denominated as such.³¹² The appellant may file a reply brief within ten days after service of the appellee's brief, and if the appellee has cross appealed, the appellee may file and serve a reply brief to the appellant's response to the issues presented in the cross appeal within ten days after service of the reply brief.³¹³ If the appeal is to a bankruptcy appellate panel, the appellant shall serve and file with his brief an appendix containing all pertinent documents and docket entries.³¹⁴ Oral arguments will thereafter be scheduled unless the district judge or the judges of the bankruptcy appellate panel unanimously determine after examination of the briefs that oral argument is not necessary.³¹⁵ Any party may submit a statement setting forth the reasons why oral argument should be granted. Upon rendition of a final decision by the district court or the bankruptcy appellate panel, an aggrieved party may file a notice of appeal within thirty days to the United States Court of Appeals. The Federal Rules of Appellate Procedure will then govern.

¶30.200 *Need and Method of Seeking a Stay Pending Appeal*

or an Order Granting or Denying Relief from the Automatic Stay

A motion to stay an order granting relief from the automatic stay may be sought from the bankruptcy judge or thereafter from the district or the bankruptcy appellate panel.³¹⁶ Such relief may be conditioned on the filing of a supersedeas bond.³¹⁷ An unstayed order modifying the automatic stay thus permitting an action such as foreclosure to occur becomes moot, and the appeal may be dismissed even though all relevant entities are parties to the appeal.³¹⁸

The grounds for seeking such a stay are recapitulated as follows:

1. A likelihood that the parties seeking the stay will prevail on the merits of the appeal;
2. The movants will suffer irreparable injury unless the stay is granted;

³¹¹ BANKR. R. 8009(a).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ BANKR. R. 8009(b).

³¹⁵ BANKR. R. 8012.

³¹⁶ BANKR. R. 8005.

³¹⁷ *Id.*

³¹⁸ See *In Re Sewanee Land, Coal & Cattle, Inc.* 735 F.2d 1294 (11th Cir. 1984); *Algeron, Inc. v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985).

3. Other parties will suffer no substantial harm if the stay is granted; [and]

4. The public interest will not be harmed if the stay is granted.³¹⁹

¶30.300 *Scope of Review of Orders on Appeal of Order Granting Relief From the Stay*

Some courts have held that a conclusion on the presence of “cause” under § 362(d)(1) is within the discretion of the bankruptcy court, and may be reviewed only for an abuse of discretion.³²⁰

Bankruptcy Rule 8013 provides that on appellate review, a bankruptcy judge’s “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witness.”³²¹ The case law indicates that appellate review of a bankruptcy judge’s conclusions of law is plenary.³²² When a finding of fact is predicated on an improper legal standard, or a proper one improperly applied, that factual finding “loses the insulation of the clearly erroneous rule.”³²³

³¹⁹ *In Re Baldwin United Corp.*, 45 Bankr. 385, 386 (Bankr. S.D. Ohio 1984).

³²⁰ See *In Re MacDonald*, 755 F.2d 715, 716 (9th Cir. 1985); *Holtkamp v. Littlefield (In Re Holtkamp)*, 669 F.2d 505, 507 (7th Cir. 1982); *In Re Frigidtemp Corp.*, 8 Bankr. 284, 289 (S.D. N.Y. 1981)(decided under BANKR. R. 401 which contained the precursor of the “for cause” basis for granting relief from stay under § 362(d)(1)); *In Re Curtis*, 40 Bankr. 795, 799 (Bankr. D. Utah 1984).

³²¹ *Carlisle Cashway, Inc. v. Johnson (In Re Johnson)*, 691 F.2d 249 (6th Cir. 1982).

³²² *Wilson v. Juffman (In Re Missionary Baptist Found. of American, Inc.)*, 712 F.2d 206 (5th Cir. 1983); See also *Johnson*, 691 F.2d at 249.

³²³ See *In Re Missionary Baptist Found.*, 712 F.2d at 209.

